DOCKET

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Status: GRANTED

Title: United States, Petitioner
v.
Betty Lou Powell

Docketed:
ebruary 7, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Cleary, John J.

ntry	Date	Note	Proceedings and Orders
1	Dec 30 1983		Application for extension of time to file petition and order granting same until February 8, 1984 (Rehnquist, January 3, 1984).
2	Feb 7 1984	G	Petition for writ of certiorari filed.
4	Feb 21 1984		Order extending time to file response to petition until April 9, 1984.
5	Apr 11 1984		DISTRIBUTED. April 27, 1984
6	Apr 12 1984	X	Brief of respondent Betty Lou Powell in opposition filed.
7	Apr 12 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Apr 30 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	May 4 1984		REDISTRIBUTED. May 10, 1984
13	May 11 1984		REDISTRIBUTED. May 17, 1984
15	May 21 1984		Petition GRANTED.
16	May 29 1984	G	Motion of respondent for appointment of counsel filed.
17	Jun 1 1984		DISTRIBUTED. June 7, 1984. (ABOVE MOTION).
20	Jun 11 1984		Motion for appointment of counsel GRANTED and it is ordered that John J. Cleary, Esquire, of San Diego, California, is appointed to serve as counsel for the respondent in this case.
21	Jul 3 1984		Joint appendix filed.
22	Jul 5 1984		Brief of petitioner United States filed.
23	Jun 18 1984		Record filed.
24	Jun 18 1984		Certified original record, 10 volumes, received.
25	Jun 18 1984		Record filed.
26	Jun 18 1984		Certified original record 8 C.A. proceedings, 1 thru 10, received.
28	Aug 2 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
29	Aug 20 1984		Brief of respondent Betty Lou Powell filed.
30	Aug 28 1984		SET FOR ARGUMENT. Monday, November 5, 1984. (1st case)
31	Aug 29 1984		CIRCULATED.
32	Oct 16 1984	X	Reply brief of petitioner United States filed.
33	Oct 17 1984		Lodging received. To be returned to the Department of Justice.
34	Nov 5 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1307

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the "inconsistent verdict" rule of *Dunn* v. *United States*, 284 U.S. 390 (1932), a conviction based upon a jury verdict finding a defendant guilty of using a telephone to facilitate a controlled substance offense may be set aside on the ground that it is inconsistent with the defendant's acquittal of the offense alleged to have been facilitated.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 708 F.2d 455. The order of the court of appeals denying the government's petition for rehearing (App., *infra*, 6a-8a) is reported at 719 F.2d 1480.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1983. The government's petition for rehearing was denied on November 10, 1983. On January 3, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] We are advised by the United States Attorney that respondent's petition for rehearing on her false statement conviction is still pending in the court of appeals. Her request for rehearing does not bear on the issue, or even involve the same counts, raised in this petition. Accordingly, under Sup. Ct. R. 20.4, the government's time to petition for certiorari runs from the denial of its rehearing petition notwithstand-

STATUTORY PROVISION INVOLVED

21 U.S.C. 843(b) provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent was convicted on three counts (Counts 3-5) of using a telephone to facilitate a conspiracy to possess cocaine with intent to distribute it or the possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 843(b), and on one count (Count 15)[1] of making a false statement to a United States magistrate in connection with the appointment of counsel, in violation of 18 U.S.C. 1001. Respondent was acquitted by the jury on one count (Count 1) of conspiracy to possess cocaine with intent to distribute it (21 U.S.C. 846).[2] She was sentenced to concurrent terms of four years'

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ing the pendency of respondent's rehearing request. Compare Sup. Ct. R. 11.3.

[1] Respondent was also acquitted on one count (Count 2) of conspiracy to possess quaaludes with intent to distribute them (21 U.S.C. 846); one count (Count 6) of telephone facilitation of a controlled substance offense (21 U.S.C. 843(b)); two counts (Counts 7-8) of assault with a deadly weapon upon federal officers (18 U.S.C. 111 and 1114); one count (Count 9) of possession of approximately two kilograms of cocaine with intent to distribute it (21 U.S.C. 841(a)(1)); one count (Count 10) of possession of approximately 2700 dosage units of quaaludes with intent to distribute them (21 U.S.C. 841(a)(1)); and four counts (Counts 11-14) of possession of a machine gun and silencers

imprisonment on each of the convictions. The court of appeals reversed the convictions on the three counts of telephone facilitation and affirmed the conviction of false statement; it remanded to permit the district court to resentence respondent in light of the reversal of the telephone facilitation convictions. App., *infra*, 1a-5a.

1. The evidence at trial consisted largely of recordings of telephone conversations that were intercepted pursuant to court-authorized electronic surveillance in April 1982. With respect to the telephone facilitation counts,[3] the evidence showed that respondent's husband, Ron Powell, and their son, Jeff, operated an extensive network to distribute cocaine and quaaludes in their home city of San Diego and in Los Angeles and St. Louis (Tr.633-634, 654). The residence where respondent and her husband lived served as the headquarters for the distribution network and was used to store controlled substances, drug paraphernalia, and records related to the drug operation (Tr. 152-156, 176-200).

Ron Powell was the central figure in the operation and took in a gross amount of approximately $15,000 per week (Tr. 930-931). Although respondent played a subordinate role in the organization, "she knew what was going on," as the defense conceded to the jury (Tr. 1265), and both assisted and benefited from the drug activities.[4]

In March 1982, Ron Powell went to Europe and left Jeff in charge of the drug business. While Ron was away, re-

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that were not registered and did not have serial numbers (26 U.S.C. 5861(d) and (i)).

[3] The facts pertaining to the false statement conviction are summarized in the opinion of the court of appeals (App., *infra*, 3a-4a); that conviction does not relate to the question presented in this petition.

[4] For example, Ron Powell, with respondent's knowledge, placed a bid on a $1.5 million ranch for them to live on and planned to use proceeds of the drug business to pay the monthly mortgage and taxes of nearly $12,000 (Tr. 602-604, 615-626, 627-639). As the district court summarized at the time of respondent's sentencing (7/26/82 Sentencing Tr. 16):

> [T]hough her role was lesser [than her husband's], she benefitted substantially. * * * [T]he home they were buying was a * * * million and a half.
>
> * * * * *
>
> [S]he knew where Mr. Powell made his money. No question about that.

spondent was involved in several telephone calls related to drug transactions (Tr. 329-342).

On April 9, 1982, Ron Powell telephoned that he would be returning home in two days (Tr. 430-432, 437-438). During the conversation he asked Jeff about collections that were due for various drug deals. In an effort to make the collections before his father arrived, Jeff began to call drug customers, including Sam Spindle (Tr. 439-440). The next day, Spindle came by respondent's residence to buy drugs, but Jeff was not at home; Spindle talked to respondent, who located Jeff by telephone and reminded him about Spindle (Tr. 442).

On April 11, Jeff picked up his father at the Los Angeles airport. That evening Jeff called respondent at home (Tr. 466-470). Respondent told him that Sam Spindle, who still owed money for drug purchases (Tr. 447, 453), had not called, but Jeff said that Spindle had contacted him (Tr. 469). Jeff asked respondent "to do [him] a favor" and "call the Thin Man" (*ibid.*); the "Thin Man" was the nickname of Sandy Segal, who had agreed to obtain the money from Spindle for Jeff (Tr. 941-943). After respondent said that she would make the call, the following conversation occurred (Tr. 469-470):

> Jeff: Okay. Which his phone number—
>
> [Respondent]: Yeah, I know.
>
> Jeff: And ask him if he has the coupons [6] and if he does, ask him if—if he would bring them over.
>
> [Respondent]: If he can bring them.
>
> Jeff: (Unintelligible) coupons to him.
>
> [Respondent]: Oh, okay.
>
> Jeff: All right?
>
> [Respondent]: If he can bring them over to me.
>
> Jeff: Yeah.
>
> [Respondent]: Okay.
>
> Jeff: All right.
>
> [Respondent]: All right.

[6] "Coupons" was a coded reference to money (Tr. 786, 934).

That telephone call formed the basis for Count 3 of the indictment.

Approximately three minutes after completing the telephone conversation with Jeff, respondent placed a call to Sandy Segal (Tr. 470-478):

> Sandy: Hello.
>
> [Respondent]: Hi. It's me.
>
> Sandy: Hi.
>
> [Respondent]: Listen, did Samuel come by and visit you?
>
> Sandy: Yeah. Well, yes and no. I was supposed to go pick it up and I haven't—can I take care of that in the morning?
>
> [Respondent]: Well, that's what Ron—they called and he wants all the money here tonight because that was the arrangement Sam made.
>
> • • • • •
>
> [Respondent]: [Last night Sam said that he would] "be over [today] before ten o'clock," and I said, "Listen, Sam, I'm sick of messing around with your crap and doing things around you."
>
> Sandy: Yeah.
>
> [Respondent]: I said, "From now on, people want to do something, they'll do it around me."
>
> Sandy: Yeah.
>
> [Respondent]: And I mean it. I'm sick of it, Sandy.
>
> • • • • •
>
> Sandy: [Ron] wants the coupons tonight, huh?
>
> [Respondent]: Yeah. Only because—the only reason he wants them is only because—
>
> Sandy: Does he know I have them?
>
> [Respondent]: Huh?
>
> Sandy: Does he know I have them?
>
> [Respondent]: No. He knows that Sam told you.
>
> Sandy: (Laughs.)
>
> [Respondent]: See, he don't believe, see. I don't either.

Tr. 471, 472, 478.[6] Respondent's telephone call to Segal formed the basis for Count 4 of the indictment.

Following his return from Europe, Ron Powell made arrangements for a new shipment of cocaine to be brought to San Diego. Among the people involved were Sandra Thomas and someone named "Nolan" (Tr. 534-548, 1164-1167). Respondent assisted in this project by answering the telephone, taking messages, and returning calls (Tr. 549, 1164-1165).[7]

On April 16, Sam Spindle called Ron Powell several times to arrange to purchase "jackets"—that is, one-eighth of an ounce (Tr. 277-278, 440, 581, 936)—of the new cocaine (Tr. 576-597). Powell indicated that he would leave the cocaine with respondent for Spindle to pick up (Tr. 581). Spindle eventually decided to buy a "euter," or one-quarter ounce (Tr. 345, 362, 804, 935), of cocaine (Tr. 597). Powell then called respondent at her office (Tr. 598-605). He said that he was "leaving a package for Sam on the bed," and he told her "to hurry home" because "[Sam's] going to come right after you get there" (Tr. 600). Respondent agreed to do so.[8] This telephone conversation formed the basis for Count 5 of the indictment.

On April 23, Powell learned of the existence of the wiretap (Tr. 679-680, 687-691, 1173). Powell called Jeff and told him to "clean up" (Tr. 691, 896). Jeff then told respondent to leave the house and drive to Los Angeles (Tr. 896, 1086). She was followed by FBI agents, who realized that Powell was aware of the wiretap and were concerned that evidence would be removed from the Powells' residence (Tr. 29, 33, 37, 45-47, 58, 66, 692). Respondent was driving at a high

[6] The next day Ron Powell called Sandy Segal, who told Powell that he had "that money" (Tr. 488) and would meet Powell "with those coupe" (Tr. 489).

[7] At trial, respondent denied knowing anyone named Sandra Thomas (Tr. 1040, 1052). However, respondent had spoken with Thomas on the telephone (Tr. 1164-1165), and Thomas's name and address were entered in respondent's address book (Tr. 1040-1041).

[8] Records seized from respondent's car after her arrest (see page 7, *infra*) indicated that Ron Powell had sold a quarter ounce of cocaine to Spindle on April 16 (Tr. 204, 964).

rate of speed and did not stop when the FBI vehicles pulled alongside her car and the agents identified themselves (Tr. 46-47, 71, 92). Instead, she made an illegal U-turn and sped away after forcing another car off the road (Tr. 72, 73). The FBI agents eventually caught up with respondent, and they again identified themselves and advised respondent that she was under arrest (Tr. 74). Respondent refused to surrender and eluded apprehension by running her car into one agent and an FBI vehicle and narrowly missing a second agent (Tr. 75, 95-96). Shortly thereafter, respondent was stopped and arrested (Tr. 77-78). Her car was impounded and, in a later search conducted pursuant to a warrant, was found to contain approximately two kilograms of cocaine, 2700 quaalude tablets, marijuana, a semi-automatic pistol with exploding bullets, two illegal silencers, a machine gun, various other firearms and drug paraphernalia, and more than $30,000 in cash (Tr. 129-150, 202-221, 779). In addition, passports for Ron and Jeff Powell were found in respondent's purse (Tr. 706-707).

2. In its instructions on the telephone facilitation counts, the district court read the relevant portion of 21 U.S.C. 843(b) to the jury (Tr. 1314). It then summarized the elements of the charges against respondent (*ibid.*):

> The elements of the offense charged in counts three through six of the indictment are as follows: first, that [respondent] used a telephone at the time charged to commit, cause, or facilitate the commission of conspiracy to possess cocaine with intent to distribute or possession of cocaine with intent to distribute; secondly, that she did so knowingly or intentionally.

In addition, the court in its general instructions advised the jury that "[a] separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged" (Tr. 1287). The jury convicted respondent on three counts of using a telephone to facilitate a controlled substance offense and on one count of making a

false statement; it acquitted respondent on the remaining counts.

3. On respondent's appeal, the Ninth Circuit reversed respondent's three convictions for telephone facilitation and affirmed her false statement conviction (App., *infra*, 1a-5a). The reversal of the Section 843(b) counts rested on the court of appeals' conclusion that the jury's guilty verdict was inconsistent with the acquittal on the conspiracy offense in Count 1. In reaching that result, the court of appeals rejected the government's contention that these verdicts were not inconsistent and could be reconciled on the theory that respondent had used the telephone to facilitate the possession of cocaine by someone not involved in the conspiracy alleged in Count 1 (App., *infra*, 2a). Having found that the verdicts were inconsistent, the court simply concluded, without elaboration, that "[t]hus, on the facts of this case, we must reverse the convictions as to [the three Section 843(b) counts]" (*ibid.*). The court did not address the government's argument that the guilty verdicts were not invalid under the "inconsistent verdict" rule of *Dunn* v. *United States*, 284 U.S. 390 (1932).

The panel denied the government's petition for rehearing and issued an order explaining its earlier opinion (App., *infra*, 6a-8a). The court referred to the rule of *Dunn* v. *United States*, *supra*, that "inconsistent verdicts do not require reversal, but may be viewed as a demonstration of the jury's leniency" (App., *infra*, 6a), and it acknowledged that "[t]his circuit follows the *Dunn* rule" (*ibid.*). Emphasizing that even under *Dunn* "there must nevertheless be sufficient evidence to sustain the guilty verdict" (*ibid.*), the court stated, without further explanation, that "[o]ne of the exceptions to the application of the *Dunn* rule, is the situation where the defendant is charged with violation of 21 U.S.C. § 843(b) and the underlying felony, said to have been facilitated, is reversed" (*id.* at 6a-7a (footnote omitted)). Adhering to its view that the verdicts were in fact inconsistent here (*id.* at 7a-8a), the court held that "[w]hen the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts,

convictions of the latter must be reversed for lack of sufficient evidence" (*id.* at 7a).[9]

Based on the reversal of the Section 843(b) counts, the court of appeals remanded the case "to the district court to permit resentencing on [the false statement count]" (App., *infra*, 5a). The court found that "[t]he possibility is * * * strong that had [respondent] been sentenced only on [the false statement count] she might have received a less severe sentence" (*id.* at 4a-5a). For this reason the court declined to "apply the concurrent sentence doctrine and not inquire into the asserted errors as to [the telephone facilitation counts]" (*id.* at 4a).

REASONS FOR GRANTING THE PETITION

The court of appeals set aside respondent's convictions under 21 U.S.C. 843(b) on the ground of inconsistency in the jury's verdict. This ruling is fundamentally at odds with the settled decisions of this Court on the "inconsistent verdict" doctrine and impermissibly invades the function of the jury. Moreover, the question presented is a recurring one that is of substantial importance to the proper administration of the criminal justice system, and the court of appeals' analysis threatens to affect prosecutions under a number of statutes. Accordingly, review by this Court is warranted.[10]

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[9] We do not seek review in this Court of the fact-bound determination of the court of appeals that the jury's verdicts were inconsistent. The issue presented here is whether such inconsistency invalidates, as a matter of law, respondent's convictions on the counts on which the jury found her guilty. *See Dunn* v. *United States*, 284 U.S. 390, 392-393 (1932); *Morris* v. *Rivera*, 454 U.S. 339, 344, 348 (1981).

[10] Even though respondent received concurrent sentences for the telephone facilitation and false statement offenses, the concurrent sentence doctrine does not counsel against this Court's review of the court of appeals' holding on inconsistent verdicts. The court of appeals remanded the case to the district court to permit resentencing on the false statement count in light of the reversal of the telephone facilitation convictions, and thus the disposition of the latter counts may affect respondent's ultimate sentence. Moreover, because 21 U.S.C. 843(c) provides enhanced penalties for second or subsequent offenses, respondent's convictions on the telephone facilitation counts have significant collateral consequences.

1. Few principles of criminal law are as well established as the rule of *Dunn* v. *United States*, 284 U.S. 390, 393, 394 (1932), that "[c]onsistency in the verdict is not necessary * * * * *. [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]." As the Court has recently reaffirmed, "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981). See also *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Borum* v. *United States*, 284 U.S. 586 (1932); *United States* v. *Farlow*, 18 U.S. (5 Wheat.) 184, 201 (1820); cf. *Standefer* v. *United States*, 447 U.S. 10 (1980). These decisions "preclude a holding that inconsistency in a verdict is intolerable in itself." *Harris* v. *Rivera*, 454 U.S. at 346.

The *Dunn* rule reflects "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons" (*Harris* v. *Rivera*, 454 U.S. at 346 (footnote omitted)). A jury "in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty' * * * even if the evidence of guilt is overwhelming" (*Jackson* v. *Virginia*, 443 U.S. 307, 317 n.10 (1979)), and it "has the power to bring in a verdict in the teeth of both law and facts." *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920). See also *United States* v. *Maybury*, 274 F.2d 899, 902-903 (2d Cir. 1960) (*Friendly, J.*). Such a verdict can result from jury "levity,"[11] "mercy,"[12] or "compassion,"[13] as well as from "compromise"[14] or from "mistake,"[15] "carelessness,"[16] or "irrationality."[17]

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[11] *Dunn* v. *United States*, 284 U.S. at 393.

[12] *Jackson* v. *Virginia*, 443 U.S. at 317 n.10.

[13] *Standefer* v. *United States*, 447 U.S. at 22.

[14] *Dunn* v. *United States*, 284 U.S. at 394; *United States* v. *Dotterweich*, 320 U.S. at 279; *Standefer* v. *United States*, 447 U.S. at 22; see also *State* v. *New York*, 348 U.S. 156, 170 (1955), overruled on other grounds, *Jackson* v. *Denno*, 378 U.S. 368 (1964).

[15] *Dunn* v. *United States*, 284 U.S. at 394.

[16] *United States* v. *Dotterweich*, 320 U.S. at 279.

[17] *United States* v. *Dotterweich*, 320 U.S. at 279; see also *Hoag* v. *New Jersey*, 356 U.S. 464, 472 (1958), limited on other grounds, *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Dunn serves to protect the integrity of the jury's verdict and ensures that an acquittal based on leniency or compromise will not nullify the very conviction that the jury determined to be appropriate.

Given this unreviewable power of the jury, an inconsistency in the verdict does not undermine the counts on which the defendant is convicted:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Dunn v. *United States*, 284 U.S. at 393 (quoting *Steckler* v. *United States*, 7 F.2d 59, 60 (2d Cir. 1925)); see also *Harris* v. *Rivera*, 454 U.S. at 347. While consistency in the verdict and "symmetry of results may be intellectually satisfying, [they are] not required" (*Standefer* v. *United States*, 447 U.S. at 25) and do not override the "important federal interest in the enforcement of the criminal law" (*id.* at 24). Thus, if "a guilty verdict * * * is supported by sufficient evidence and is the product of a fair trial" (*Harris* v. *Rivera*, 454 U.S. at 344), it is a valid expression of the jury's determination and should not be reversed on grounds of inconsistency.

2. In this case neither respondent nor the court of appeals has asserted that there was any defect or unfairness in the trial proceedings. Likewise, they have not—apart from the issue of inconsistency—controverted the sufficiency of the evidence under traditional standards to support the guilty verdicts on the Section 843(b) counts, and that evidence in fact points inescapably to respondent's guilt (see pages 3-7, *supra*).[18]

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[18] In this case, the district court, which heard the "long" and "extensive" tapes of respondent's recorded telephone conversations, specifically noted that "[t]here is no question in my mind that the jury correctly anal[y]zed [respondent's] involvement in the telephone counts. I agree with [the prosecutor] that, though her role was lesser, she benefitted substantially. * * * * * [Respondent's husband] conducted

In these circumstances, where respondent's "trial was fairly conducted * * * [and] the record contains adequate evidence of [her] guilt * * * beyond a reasonable doubt" (*Harris* v. *Rivera*, 454 U.S. at 348 (footnote omitted)), *Dunn* precludes reversal of her convictions under Section 843(b) on inconsistent verdict grounds. The decisions of this Court contain no limitation on the categorical and unqualified nature of the *Dunn* rule, and the reasons for the rule are fully applicable here. In particular, since, as the prosecutor characterized it in his closing argument, respondent was "not the heavy * * * [but rather a] small-time partic[i]pant in a major narcotics organization" (Tr. 1208), the jury may have been moved by leniency to acquit respondent of the cocaine conspiracy even though it was equally convinced of her guilt on that count as on the telephone facilitation counts on which she was convicted. Especially in light of the instruction to the jury that "[e]ach charge and the evidence pertaining to it should be considered separately" and that "[t]he fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged" (Tr. 1287),[19] such leniency could, as *Dunn* recognizes, account for the jury's verdict.[20]

3. The court of appeals nonetheless set aside the verdict on the basis of an "exception[] to the application of the *Dunn* rule * * * where the defendant is charged with [a]

his business over that telephone. [Respondent] knew what that business was because she was convicted of counts using the phone in the same manner" (7/26/82 Sentencing Tr. 16).

[19] As Judge Friendly observed in *United States* v. *Carbone*, 378 F.2d 420, 422 (2d Cir.), cert. denied, 389 U.S. 914 (1967), "if the [inconsistent verdict] rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants."

[20] That the jury acted deliberately and conscientiously in returning its verdict is shown by the fact that it acquitted respondent on one count (Count 6) of telephone facilitation under Section 843(b). Count 6 was based on respondent's telephone call to an airline to change her husband's flight reservation for a trip to St. Louis (Tr. 628-631). This call was not on its face demonstrably related to a drug transaction, and respondent was acquitted of the charge.

violation of 21 U.S.C. § 843(b) and the underlying felony, said to have been facilitated, is reversed" (App., *infra*, 6a-7a (footnote omitted)). In the court's view, "[w]hen the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts, convictions of the latter must be reversed for lack of sufficient evidence" (*id.* at 7a). Accordingly, the court held "that there is insufficient evidence to support the convictions on [the telephone facilitation counts]" (*id.* at 8a).

In so holding, the court of appeals committed two fundamental errors. First, it confused the concepts of sufficiency of the evidence and consistency of the verdict. As discussed above (see page 11, *supra*), there is no doubt that the evidence of respondent's guilt on the telephone facilitation counts was adequate under traditional standards. To be sure, the telephone facilitation charges required proof of the offense alleged to have been facilitated.[21] But—apart from the fact that the jury returned an inconsistent verdict—the government did prove the existence of the facilitated offense, as the jury must have found in convicting respondent on the telephone facilitation counts. Thus, the only issue presented is whether those convictions are rendered invalid by the inconsistency in the verdict. In casting its decision in terms of the sufficiency of the evidence, the court of appeals failed to understand that "'[t]he question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached'" (*Harris* v. *Rivera*, 454 U.S. at 348 n.20 (quoting *Jackson* v. *Virginia*, 443 U.S. at 319-320 n.13)).[22]

[21] See, *e.g.*, *United States* v. *Whitten*, 706 F.2d 1000, 1006 (9th Cir. 1983); *United States* v. *Ward*, 696 F.2d 1315, 1319 (11th Cir. 1983), cert. denied, No. 82-6437 (May 16, 1983); *United States* v. *Rey*, 641 F.2d 222, 224-225 n.6, 227 n.10 (5th Cir.), cert. denied, 454 U.S. 861 (1981).

[22] Of course, to the extent that the evidence is truly insufficient under traditional standards to establish the facilitated offense, the Section 843(b) conviction would have to be reversed quite without regard to the consistency of the verdict on any other counts. See *United*

Second, the court of appeals' exception to *Dunn*, although in accord with other decisions that have also carved out such an exception for convictions under Section 843(b),[23] is unjustified and squarely inconsistent with the rationale of the *Dunn* rule. *Dunn* recognizes the unreviewable power of the jury to acquit as a result of "lenity," "compromise," or "mistake" (284 U.S. at 393-394), and these considerations are no less applicable where, as here, one offense includes as an essential element the commission of an underlying offense—that is, "compound-predicate" offenses. Furthermore, in *Dunn* itself, the conduct charged in the counts on which the jury acquitted the defendant was, in fact, necessary to establish the offense on which he was convicted. See 284 U.S. at 391; *id.* at 395, 397, 398, 407 (Butler, J., dissenting).[24] Although *Dunn* did not strictly involve compound-predicate offenses, the interconnection of the charges in that case strongly suggests that the *Dunn*

States v. *Terry*, 702 F.2d 299, 321 n.23 (2d Cir. 1983), cert. denied, No. 82-1689 (May 16, 1983); *United States* v. *Bailey*, 607 F.2d 237, 245 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980). The court of appeals' confusion over the issues of the sufficiency of the evidence and the consistency of the verdict is illustrated by its reliance (App., *infra*, 2a, 7a) on *Bailey*, which involved a conventional challenge to the adequacy of the government's proof and did not present an inconsistent verdict question.

[23] *See United States* v. *Brooks*, 703 F.2d 1273, 1278-1279, reh'g denied, 712 F.2d 1419 (11th Cir. 1983) (table); *United States* v. *Hanoah*, 584 F.2d 27 (3d Cir. 1978); see also *United States* v. *Berardi*, 675 F.2d 894, 901 n.15 (7th Cir. 1982). In *Good* v. *United States*, petition for cert. pending, No. 83-6102 (filed Jan. 16, 1984), petitioner contends that the Third Circuit, notwithstanding *Hanoah*, affirmed his conviction under 21 U.S.C. 843(b) even though the jury had acquitted him of the underlying felony that he was charged with facilitating.

[24] In *Dunn* the defendant was charged with unlawful possession of liquor, unlawful sale of liquor, and maintaining a common nuisance by keeping liquor for sale. The evidence was identical on all three counts, and the nuisance count was based on the same conduct alleged in the possession and sale counts. The jury acquitted the defendant of possession and sale but convicted him of nuisance. Notwithstanding the relationship among the counts and the identity of the evidence, this Court affirmed the conviction on the ground that "[c]onsistency in the verdict is not necessary" (284 U.S. at 393).

rule does not admit of the exception adopted by the court below.[25]

In establishing an exception to *Dunn* for the compound offense in Section 843(b), the courts of appeals have relied on the following passage in the *Dunn* opinion (284 U.S. at 393 (citations omitted)):

> Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented against the defendant for possession and for

[25] This Court has never recognized any exception to the *Dunn* rule. Contrary to the understanding of the court of appeals (App., *infra*, 6a n.1), *Hartzel* v. *United States* 322 U.S. 680 (1944), does not stand for any such exception. In *Hartzel*, three defendants were convicted of conspiring with one another; thereafter, the convictions of two of the co-conspirators were set aside on grounds of insufficient evidence (see 322 U.S. at 682 n.3). In that posture, the evidence was necessarily inadequate to establish that Hartzel had entered into a conspiracy with the other defendants as alleged; the government accordingly acknowledged in this Court that Hartzel's conspiracy conviction could not be sustained (Brief for the United States at 4 n.1, 23 n.2 (No. 531, 1943 Term)), and the Court agreed with this concession (322 U.S. at 682 n.3). *Hartzel* thus turned on the sufficiency of the evidence under traditional standards to support the conspiracy charged and—because the jury had convicted all the defendants of conspiracy—did not in any way involve the issue of an inconsistent verdict; indeed, neither the parties nor the Court cited to *Dunn* or to *Dotterweich*, which had been decided the same Term as *Hartzel*.

The court of appeals also noted (App., *infra*, 6a-7a n.1) that lower federal courts have developed certain exceptions to *Dunn* in cases in which a defendant is convicted of conspiracy. See, *e.g.*, *United States* v. *Patterson*, 678 F.2d 774, 780-781 (9th Cir.), cert. denied, 459 U.S. 911 (1982); *United States* v. *Morales*, 677 F.2d 1 (1st Cir. 1982); *United States* v. *Dus-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 n.3 (9th Cir. 1981). We doubt the soundness of these exceptions under *Dunn*, especially in light of this Court's decision in *Standefer* v. *United States*, *supra*. See *United States* v. *Espinoza-Corpo*, 630 F.2d 328, 330-333 (5th Cir. 1980). However, the correctness of those exceptions to *Dunn*—which appear to rest on the view that "courts should take a closer look at conspiracy convictions [in inconsistent verdict cases] where the jury's verdict on other counts indicates some doubt that a conspiracy actually took place" (*United States* v. *Morales*, 677 F.2d at 3)—is not presented here, since respondent was *acquitted* on the cocaine conspiracy count and the court of appeals based its decision on the compound nature of the substantive telephone facilitation offense.

> maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.

Noting that the Section 843(b) offense and the offense alleged to have been facilitated are "interdependent" (*United States* v. *Hawnah*, 584 F.2d at 30) rather than "separate and distinct" (*United States* v. *Brooks*, 703 F.2d at 1278), these courts have read *Dunn* to permit a special rule for such compound-predicate offenses.

Dunn does not support this exception. Whatever the correctness of the discussion of res judicata at the time *Dunn* was decided,[96] it has long since been repudiated by subsequent decisions of this Court. *See, e.g., Sealfon* v. *United States*, 332 U.S. 575 (1948); *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Notwithstanding this development, the *Dunn* rule remains of continued and undiminished vitality based, as the Court has recognized, on "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris* v. *Rivera*, 454 U.S. at 346 (footnote omitted); see also *id.* at 346 n.15; *Standefer* v. *United States*, 447 U.S. at 22; *Hamling* v. *United States*, 418 U.S. at 101.[97] In accordance with this Court's analysis, the lower federal courts—with the exception of

[96] Prior to *Dunn*, the Court had recognized the applicability in criminal cases of preclusion doctrines such as res judicata. *See, e.g., United States* v. *Adams*, 281 U.S. 202, 205 (1930); *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916); *Coffey* v. *United States*, 116 U.S. 436, 443 (1886). Thus, even at the time, the discussion of res judicata in *Dunn* was open to question. *See United States* v. *Carbone*, 378 F.2d 420, 422 & n.6 (2d Cir.), cert. denied, 389 U.S. 914 (1967); Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 Colum. L. Rev. 999, 1005 (1960); Comment, Ashe v. Swenson: *Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Colum. L. Rev. 321, 332 n.68 (1971). See also *Harris* v. *Rivera*, 454 U.S. at 346 n.15.

[97] Indeed, even before *Sealfon* and *Ashe*, the Court reaffirmed the *Dunn* rule without any reference to the res judicata rationale. *See United States* v. *Dotterweich*, 320 U.S. at 279.

the decisions under Section 843(b)—as well as commentators have concluded that the *Dunn* rule now rests on the role and prerogatives of the jury rather than on principles of res judicata.[98] Thus, the court of appeals in this case, like the courts in *Hawnah* and *Brooks*, misperceived the proper basis of the *Dunn* rule and incorrectly resurrected a long-discredited conception of the inconsistent verdict doctrine. Since the issue of inconsistent verdicts is a recurring one that has already arisen in several circuits in connection with Section 843(b), further review by this Court is warranted.

Moreover, while purporting to create a narrow exception, the res judicata theory advanced in *Hawnah* and *Brooks* and accepted by the court below would effectively overrule *Dunn* in cases, such as this one, involving an inconsistency in the verdicts returned against a single defendant. Nothing in that theory logically confines it to inconsistent verdicts on compound-predicate offenses. On the contrary, if *Dunn* rests on principles of preclusion and is limited to cases in which an initial acquittal on one count would not bar a subsequent prosecution on the other count, few if any inconsistent verdicts would be sustained. Indeed, under modern principles of collateral estoppel, the inconsistent verdict involved in *Dunn* itself would be impermissible, since the jury's acquittal of unlawful possession and sale of liquor could foreclose a later prosecution for maintaining a common nuisance by keeping the same liquor for sale. See page 14, *supra*; *United States* v. *Carbone*, 378 F.2d 420, 422 (2d Cir.), cert. denied, 389 U.S. 914 (1967). The analysis underlying the exception created for the Sec-

[98] *See, e.g., United States* v. *Uzzolino*, 651 F.2d 207, 213 (3d Cir.), cert. denied, 454 U.S. 865 (1981); *United States* v. *Greene*, 497 F.2d 1068, 1085-1086 (7th Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974); *United States* v. *Fox*, 455 F.2d 1255, 1258 n.22 (D.C. Cir. 1970); *United States* v. *Carbone*, 378 F.2d 420, 422-423 (2d Cir.), cert. denied, 389 U.S. 914 (1967); *United States* v. *Maybury*, 274 F.2d 899, 905 (2d Cir. 1960); Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649, 650-651 (1950); Comment, *supra*, 71 Colum. L. Rev. at 332-333.

tion 843(b) offense threatens to swallow the *Dunn* rule and constitutes nothing less than a fundamental challenge to the rationale of the inconsistent verdict doctrine.[19]

Even if the decision below could be restricted to compound-predicate offenses, it would remain of substantial concern. A number of statutes, involving some of the most important and frequently invoked provisions of federal criminal law, prescribe compound-predicate offenses, including the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962), the continuing criminal enterprise statute in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 848), the Travel Act (18 U.S.C. 1952), and the Gun Control Act of 1968 (18 U.S.C. 924(c)). The court of appeals' decision casts doubt on the inconsistent verdict rule in these significant areas and jeopardizes jury verdicts that are based on a fair trial establishing the defendant's guilt beyond a reasonable doubt. This Court's inconsistent verdict decisions forestall such an undesirable result, and the court of appeals' attempt to circumvent *Dunn* calls for this Court's review.[20]

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[19] Furthermore, there is no reason to apply preclusion principles to different counts in a single proceeding. The doctrines of res judicata and collateral estoppel are designed to "protect[] litigants from burdensome relitigation and * * * promot[e] judicial economy." *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984), slip op. 7; *see also United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4. Such considerations are simply inapposite to jury verdicts on multiple counts at a single trial.

[20] Having found that the verdict was inconsistent, the court of appeals reversed respondent's convictions on the three counts under Section 843(b). We submit that the proper disposition, in the event that the inconsistent verdicts are not allowed to stand, would be to remand for a new trial on those counts. *See Pipefitters Local Union No. 169* v. *United States*, 407 U.S. 385, 400 n.11 (1972); *Crawford* v. *Fenton*, 646 F.2d 810, 817 n.8 (3d Cir.), cert. denied, 454 U.S. 872 (1981); *United States* v. *Maybury*, 274 F.2d at 904-906 (opinion of Friendly, J.), 908 (opinion of Learned Hand, J.); Note, *Criminal Law: Validity of Inconsistent Verdicts*, 1961 Duke L.J. 133, 136-137 n.14. By its outright reversal, the court of appeals has unreasonably expanded the consequences of the jury's inconsistency and, in effect, has immunized respondent for crimes that the government has proven by sufficient evidence beyond a reasonable doubt. Cf. *Harris* v. *Rivera*, 454 U.S. at 347; *Standefer* v. *United States*, 447 U.S. at 25. We are aware of no

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1984

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reason that would bar a retrial in the circumstances of this case. Since the government's evidence at the initial trial was adequate, the Double Jeopardy Clause does not forbid a second proceeding. *See Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). Likewise, because of the inconsistency in the verdict, the basis for the jury's acquittal cannot satisfactorily be determined (*see* page 11, *supra*), and therefore the doctrine of collateral estoppel does not preclude a new trial. *See Standefer* v. *United States*, 447 U.S. at 23 n.17; Comment, *Inconsistent Verdicts in Illinois Criminal Trials*, 10 J. Mar. J. Prac. & Proc. 263, 286 (1977). Although this argument was not presented below, the court of appeals' resolution of the inconsistent verdict issue necessarily raises the question of the proper disposition of the case. *See* 28 U.S.C. 2106. Accordingly, we suggest that, if the Court disagrees with our submission on the validity of the jury's verdict, the appropriate course would be to remand to the court of appeals for consideration of the issue of a new trial. *See Busic* v. *United States*, 446 U.S. 398, 412 n.19 (1980).

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 82-1473

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

BETTY LOU POWELL,
DEFENDANT-APPELLANT.

Argued and Submitted March 8, 1983.
Decided June 14, 1983.

Appeal from the United States District Court for the Southern District of California.

Before CHAMBERS, FLETCHER and NELSON, Circuit Judges.

CHAMBERS, Circuit Judge:

Betty Powell was indicted in a fifteen count indictment and acquitted of all charges except three counts (under [21] U.S.C. § 843(b) (1976)) of using a telephone to facilitate certain drug offenses, and one count (under 18 U.S.C. § 1001 (1976)) of giving a false statement to the magistrate in applying for leave to proceed in forma pauperis. She was given four concurrent four year sentences and she appeals.

Count 1, of which she was acquitted, charged a conspiracy between appellant and her husband and son and "divers other persons" to knowingly and intentionally possess cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (1976). Listed as three of the overt acts to support this conspiracy charge were telephone calls made by or to her on April 11, 1982 and on April 16, 1982. These same telephone

calls are the subject of Counts 3, 4 and 5 respectively—the counts of which she was convicted.

Appellant argues, on appeal, that she is the victim of inconsistent verdicts. The government responds that there is no inconsistency because Counts 3, 4 and 5 charge use of a telephone to facilitate not only conspiracy to possess and distribute cocaine, but also use of the telephone to facilitate possession with the intent to distribute cocaine. The government argues that the jury determined that she was guilty of facilitating the possession by someone other than those persons implicated in the conspiracy charged in Count 1.

We have reviewed the record and we are not convinced that there is evidence to support the government's claim that "someone other than" the conspirators named in Count 1 had possession and that appellant's telephone calls facilitated that possession. Thus, on the facts of this case, we must reverse the convictions as to Counts 3, 4 and 5. *United States v. Bailey*, 607 F.2d 237, 245 (9th Cir.1979), cert. den.[,] 445 U.S. 934, 100 S.Ct. 1327, 63 L.Ed.2d 769 (1980); *United States v. Hannah*, 584 F.2d 27, 28-30 (3rd Cir.1978) (cases holding that 21 U.S.C. § 843(b) convictions must be reversed when the conviction on the underlying conspiracy count is reversed).

Appellant also contends that her privately retained counsel was guilty of conflict of interest in representing both her son and herself, and that she was therefore denied effective assistance of counsel. The record demonstrates that the potential conflict was discussed in detail in open court. The district judge carefully informed appellant of her right to independent representation. He advised her that, if she insisted on retaining her attorney despite the dual-representation, it might affect the attorney's ability to cross-examine witnesses in appellant's behalf, and that the attorney would be prohibited from disclosing certain confidences. Despite repeated warnings and opportunities to obtain other counsel, Powell states that she understood her rights and wished to be represented by her attorney.

There is no doubt but that in a situation such as this, it would have been far preferable to have each defendant represented by separate counsel. But in the face of appellant's insistence on retaining her attorney, we must conclude that she waived the rights which she now claims were denied her. Perhaps more important, she has not sufficiently demonstrated prejudice. Her claims of prejudice are not persuasive and, in view of our reversal of the convictions on Counts 3, 4, and 5, she can claim no prejudice at all. Her conviction of Count 15 could not be affected by the claimed conflict of interest. We summarily reject appellant's claim that she did not otherwise receive the effective assistance of counsel. *See, e.g., United States v. Altamirano*, 633 F.2d 147, 150-53 (9th Cir.1980), *cert denied*, 454 U.S. 839, 102 S.Ct. 145, 70 L.Ed.2d 120 (1981); *Cooper v. Fitzharris*, 584 F.2d 1325, 1327 (9th Cir.1978) (*en banc*), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

We turn then to Count 15, the charge of violation of 18 U.S.C. § 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Powell was questioned by the magistrate about her claimed financial inability to obtain counsel. She responded to his questions by saying she had no more than $400 in bank accounts. This response was then en-

tered on the Financial Statement (Criminal Justice Act Form 23) and appellant signed it, certifying the accuracy of what was entered on the form. Immediately under the space for her signature was a statement in very heavy bold face print saying:

> Warning: A false or dishonest answer to a question in this affidavit may be punishable by fine or imprisonment, or both.

It was subsequently shown that Powell had over $20,000 in a bank account at the time, and a month later she gave a power of attorney to a lawyer whom she retained to represent her—giving him access to the account.

Section 1001 is applicable to matters before the Judiciary. *See United States v. Bramblett*, 348 U.S. 503, 509, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955) (dictum). While some restrict its use in the judicial branch to "housekeeping" as opposed to "judicial" functions, see *United States v. Abrahams*, 604 F.2d 396, 402-03 (5th Cir.1979), we are not persuaded that there is any restriction against its use when a criminal defendant, as happened here, blatently [*sic*] lies about her financial condition on a document such as the CJA 23 affidavit, containing as it does the very precise and apparent warning of the potential penalty for falsehood. This misrepresentation did not occur during a judicial proceeding. Cf. *id.* We, therefore, affirm the conviction of violation of 18 U.S.C. § 1001, on the ground that the falsehood contained in the written affidavit violated that statute. We do not reach the more difficult question of whether her false statements orally to the magistrate would support a conviction under the statute.

We reverse the convictions on Counts 3, 4 and 5, and we affirm the conviction on Count 15. We reject the government's contention that we apply the concurrent sentence doctrine and not inquire into the asserted error as to Counts 3, 4 and 5. The possibility is too strong that had appellant been sentenced only on Count 15 she might have received a less severe sentence. The case is therefore remanded to the district court to permit resentencing on Count 15.

APPENDIX B

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 82-1473

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

BETTY LOU POWELL, DEFENDANT-APPELLANT.

ON GOVERNMENT'S PETITION FOR REHEARING

Before CHAMBERS, FLETCHER and NELSON, Circuit Judges.

The petition for rehearing chides us for not having discussed *Dunn* v. *United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1931), and its rule that inconsistent verdicts do not require reversal, but may be viewed as a demonstration of the jury's leniency. *Id.* at 393, 52 S. Ct. at 190. This circuit follows the *Dunn* rule but, with other circuits, acknowledges that there must nevertheless be sufficient evidence to sustain the guilty verdict. *United States* v. *Brooklier*, 685 F.2d 1208, 1220 (9th Cir. 1982), cert. denied ___ U.S. ___, 103 S.Ct. 1195, 75 L.Ed.2d 439 (1983); *United States* v. *McCall*, 592 F.2d 1066, 1068 (9th Cir.), cert. denied[,] 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 665 (1979). One of the exceptions to the application of the *Dunn* rule[1],

[1] Other exceptions to the Dunn rule are found in: *United States v. Hartzell*[*sic*], 322 U.S. 680, 682 n. 3, 64 S.Ct. 1233, 1234 n.3, 88 L.Ed. 1534 (1944) and *United States* v. *Williams*, 503 F.2d 50, 54 (6th Cir. 1974), cases in which the acquittal of all co-conspirators required the acquittal of the sole remaining conspirator. But *cf. Standefer* v. *United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), where the aider and abetter's conviction was left standing after the principal was acquitted. See also *United States* v. *Morales*, 677 F.2d 1 (1st Cir. 1982), acquittal of substantive crimes constituting overt acts required overturning of conspiracy conviction where jury was instructed without objection that proof of one or more of the overt acts was required to convict of conspiracy.

is the situation where the defendant is charged with violation of 21 U.S.C. § 843(b) and the underlying felony, said to have been facilitated, is reversed. *United States* v. *Bailey*, 607 F.2d 237 (9th Cir. 1979), cert. denied[,] 445 U.S. 934, 100 S.Ct. 1327, 63 L.Ed.2d 769 (1980); *United States v. Brooks*, 703 F.2d 1273, 1278 (11th Cir. 1983); *United States* v. *Hannah*, 584 F.2d 27 (3rd Cir. 1978).

When the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts, convictions of the latter must be reversed for lack of sufficient evidence. *United States* v. *Berardi*, 675 F.2d 894, 901 n. (7th Cir. 1981). When, however, the government tries the case on the theory that another felony is the predicate crime, the conviction may stand. *United States* v. *Arias*, 639 F.2d 1183 (5th Cir. 1981). The government, in its petition, says that the government "never conceded" the conspiracy was the predicate felony in this case. We are not, however, so much concerned with what it may or may not have conceded, as we are the theory upon which it presented its case to the jury. Nowhere do we find the jurors were told in the government's closing argument that the substantive crime of possession was the predicate felony. Indeed, the closing argument stresses very heavily appellant's assistance of her husband who the government contended was the "heavy" in the operation of the narcotics business.

The instructions (like the trial itself) focus on the alleged conspiracies and various other substantive crimes of which appellant was acquitted. The only attention

given to the telephone facilitation counts was to read Section 843(b) and then to read one of the counts. We suspect that the reading of the count added more confusion than it did clarification. The drafting is unfortunate as it alleges facilitation of a "controlled substance offense" [sic] and then proceeds to describe that single predicate offense as the two felonies of "conspiracy to possess with intent to distribute and possession with intent to distribute cocaine."

On this record we are not willing to presume, as the government would have us do, that the jurors must have intended to find appellant guilty of having facilitated someone's possession of cocaine, apart from the conspiracy of which she was acquitted (Counts 1) and apart from the possession of which she was acquitted (Counts 9). All of the telephone conversations that the government put into evidence were offered for the purpose of establishing "the scope and course of the conspiracy" (RT 270). And each of the telephone conversations charged as offenses in Counts 3, 4 and 5 were listed as overt acts in the conspiracy charged in Count 1.

We adhere to our statement in our opinion that there is insufficient evidence to support the convictions on Counts 3, 4 and 5, 708 F.2d 455. The government's petition for rehearing is denied.

OPPOSITION BRIEF

NO. 83-1307

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

BETTY LOU POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Proceedings Below

The Respondent was charged with 15 counts. Count One charged an overall conspiracy to possess with intent to distribute cocaine (21 U.S.C. §41(a)(1) and §46) which included as specified overt acts:

> 1. On or about April 11, 1982, at approximately 8:02 p.m., within the Southern District of California, Defendant BETTY LOU POWELL had a phone conversation with her son, Jeff, about calling an illegal drug customer and asking him for payment.
>
> 2. On or about April 11, 1982, at approximately 9:10 p.m., within the Southern District of California, Defendant BETTY LOU POWELL had a phone conversation with Sandy Segal about payment for illegal drugs.

3. On or about April 16, 1982, at approximately 4:19 p.m., within the Southern District of California, Defendant BETTY LOU POWELL had a phone conversation with Ron Powell concerning drugs to be left for "Sam". SCR 2-3[1]

Count III alleged the use of the telephone in facilitating a "conspiracy to possess with intent to distribute and possession with intent to distribute cocaine" in violation of 21 U.S.C. 843(b)[2] "[o]n or about April 11, 1982 at approximately 8:02 p.m. Count IV charged in essence the same offense but "[o]n or about April 11, 1982 at approximately 8:10 p.m.," and Count V charged another violation "[o]n or about April 16, 1982, at approximately 4:19 p.m." SCR 1-7[2]

During a hearing to determine eligibility for appointed counsel the Respondent allegedly made a false statement to the Magistrate concerning her bank accounts, and she was charged with a false official statement (18 U.S.C. 1001). SCR 17.

At the jury trial Respondent was represented by attorney Frank R. Prantil. He also represented the respondent's son who had been charged as a juvenile delinquent on the same set of events; the son's case was then pending before another district judge. The court accepted defense counsel's statement that there was no conflict of interest even if the son were called as a witness, which occurred RT 892-916, 923-986[3].

During the pretrial and trial proceedings (23 April 1982 to 10 August 1982), defense attorney Frank Prantil was an accessory after the fact (18 U.S.C. 3) because he did "comfort and assist" cocaine conspirator Ronald Powell.

1/ "SCR" refers to the Excerpt of the Record. "CT" refers to Clerk's Transcript, and "RT" refers to the Reporters Transcript. Because the CT contains only the original indictment, the SCR has been used for all references to the superseding indictment.

2/ Violations of 21 U.S.C. 843(b) will be referred to as the "telephone counts."

3/ The court secured a waiver of conflict from the defendant as to the joint representation by counsel of her and her son (Supplemental Rule 44(c)) RT 17 May 1982), and no waiver was secured as to the possible conflict because of his representation or assistance to the fugitive husband Ron Powell.

(Count I). On 21 July 1982, this attorney falsely testified before the Grand Jury about giving money to or collecting money for Ron Powell (Counts III and IV). On 6 October 1982 Frank Prantil gave false testimony in this case in a bond hearing about giving money to Ron Powell (Counts IX and X). Frank Prantil was convicted by a jury of these charges, and on 21 January 1984 District Judge Gordon Thompson, Jr., sentenced him to a term of four years followed by five years probation[4].

After the jury had acquitted Respondent of 11 counts, on 26 July 1982 the District Court sentenced the Respondent to four years imprisonment each on the three telephone counts and the false statement count, but the sentences on each count ran concurrently (CT 32). The Court of Appeals reversed as to the three telephone counts because of a lack of evidence but affirmed the conviction as to the false statement.[5]

STATEMENT OF THE FACTS

The Conspiracy Counts - Counts I and II

In the afternoon of 1 April 1982, a court-authorized wiretap was installed on the phone at the home of Ronald Powell in El Cajon, California (SCR 56-62; RT 230-234). Also living at the residence were the Respondent, who was Ronald's wife, and two of their children: Jeffery, who was almost 17, and Michael, who was 15 (RT 892, 995). Between 1 April and 24 April when the tap was terminated, "several hundred" (RT 695) calls were intercepted and 85 of these conversations were played to the jury, 83 by the prosecution and 2 by the defense (RT 232-694, 840-878, 1162-1178).

4/ United States v. Frank C. Prantil, S.D. Cal. 83-0368-CT. A notice of appeal has been filed. The court is requested to take judicial notice of these lower court proceedings. See Fed.R.Evid. 201. The indictment is attached as Appendix A, and the judgment and commitment is attached as Appendix B.

5/ The respondent will file a petition for writ of certiorari to review the conviction for false statement. The petition for rehearing as to the false statement was denied on 29 February 1984.

These conversations along with records seized at the home (RT 151-200) showed that Ronald Powell and several other people, including Ronald's brother in St. Louis and his son Jeffrey, were involved in a large scale cocaine distribution operation that also dealt in the distribution of quaaludes and marijuana (RT 932).

The operation dealt in both large and small quantities of cocaine (RT 938, 948) and involved people in the San Diego County area as well as people in the eastern part of the United States. Records analysed for February 1982 showed that at the end of that month alone approximately $57,000 was owed to Ronald Powell (RT 798). Telephone conversations revealed that Ronald Powell was negotiating for the purchase of a 331-acre ranch in San Diego County with a purchase price in excess of one million dollars (RT 604, 619). Part of the purchase price was to include an under the table $300,000 payment in cash. The trunk of the car the Respondent was driving when she was arrested contained 2 kilograms of cocaine, 4,700 quaaludes, $31,000 in cash, a machine gun and silencers (RT 203-223). The Respondent was acquitted of all charges respecting the items found in the trunk.

The prosecution theory of the Respondent's involvement in this conspiracy was summarized in the Assistant United States Attorney's closing arguments:

> "What we have here is a small-time participant, no question. She is not the heavy. Ron Powell is. Small-time participant (sic) in a major narcotics organization. When it's convenient, she'll assist. She enjoys the profits earned in the drug organization. (RT 1208).
>
> What we have got here ... is Cocaine, Incorporated. We have got the president, we have got the vice-president and treasurer, and we've got the board of directors. Mrs. Powell is one of the secretaries. She takes messages. She relays messages. She knows what she is doing when she does it." (RT 1279).

Count III.

When the telephone tap was first installed Ronald Powell was in Europe with his daughter (RT 442). He left his son Jeffrey Powell in charge of the business (RT 939). Ronald Powell

came back from Europe on 11 April 1982 (RT 447). Before he arrived Jeffrey made some calls in order to collect money that was owed (RT 447). One of the people that owed money was a customer by the name of Sam Spindle (RT 942). Jeffrey had asked Sandy Segal, another customer who went by the nickname the "Thin Man," to collect the money Spindle owed (RT 941-943).

On Easter Sunday, 11 April 1982, Jeffrey Powell went to the Los Angeles Airport to pick up his father (RT 447-449). On the way to San Diego from the airport Jeffrey called his mother. The call was placed at 8:01 p.m. and lasted about five minutes (EXH 96-97; RT 447-472). Jeffrey also asked his mother whether she liked the Easter gifts that had been sent to her. The call concluded with the following conversation:

> "BETTY: But we got -- oh, let's see. I want you to know Sam never has called.
>
> JEFF: He called me.
>
> BETTY: Oh, he called you? Oh.
>
> JEFF: Yeah. You want to do me a favor?
>
> BETTY: What?
>
> JEFF: Call the Thin Man.
>
> BETTY: Yeah.
>
> JEFF: Okay. Which his phone number--
>
> BETTY: Yeh, I know.
>
> JEFF: And ask him if he has the coupons, and if he does, ask him if--if he could bring them over.
>
> BETTY: If he can bring them.
>
> JEFF: (Unintelligible) coupons to him.
>
> BETTY: Oh, okay.
>
> JEFF: All right?
>
> BETTY: If he can bring them over to me.
>
> JEFF: Yeah.
>
> BETTY: Okay.
>
> JEFF: All right.
>
> BETTY: All right.
>
> (EXH 96-97; RT 469-470).

"Coupons" was a word that was used for money (RT 934).

Count IV.

Right after this phone call was concluded the Respondent called Sandy Segal (BEH 97-105; BT 470-478). This call lasted somewhat longer. The majority of the call concerned the Respondent's problems with her family, with her car being towed away from a parking lot, with an ill-fated Easter dinner in Julian, California, and with the delay in her husband's flight. The call began as follows:

"SANDY: Hi.

BETTY: Listen, did Samuel come by and visit you?

SANDY: Yeah. Well, yes and no. I was supposed to go pick it up and I haven't -- can I take care of that in the morning?

BETTY: Well, that's what Sam--they called and he wants all the money home tonight because that was the arrangement Sam made.

SANDY: Oh, shit.

BETTY: See, that's the problem (unintelligible).

SANDY: See--

BETTY: No, no, last night I--

SANDY: Just between me and you, you know-- I mean, I can go get it. I just--

BETTY: I know; but the thing that pissed me off is that last night--

SANDY: Get me involved.

BETTY: Yeah, I know. I think--what do you think he did to me last night?

SANDY: (Unintelligible).

BETTY: No. You know what he says to me? He says, Well, how-- What you going to do tomorrow? And I said, I'm going to take Mike out for a brunch and another egg hunt.

SANDY: Right.

BETTY: And he says, Well, I'll be over before ten o'clock, and I said, Listen, Sam, I'm sick of messing around with your crap and doing things around you.

SANDY: Yeah.

BETTY: I said, from now on, People want to do something, they'll do it around me.

SANDY: Yeah.

BETTY: And I mean it. I'm sick of it, Sandy.

SANDY: I understand that.

BETTY: You know? I took--

SANDY: Are coming home tonight?

BETTY: Yeah. Oh, are you ready for this? The plane was two hours later.

SANDY: Oh-huh.

BETTY: See-see, nobody ever believes me. I don't know nothing. You understand, I told that to Jeff. I said, Your dad will be lucky if he's in our driveway by eleven.

SANDY: Yeah." (BEH 99-100; BT 471-472).

This conversation was the basis for Count IV of the indictment.

Count V

On 16 April 1982, at about 4:10 p.m., Dan Spindle called Ronald Powell and during the conversation asked Powell to bring back with him a "zoter," which meant a quarter ounce of cocaine (BT 587, 804). Ronald Powell said okay and indicated he would leave the "stuff" (BT 587).

A few minutes later Jeffrey Powell called his mother where she worked (BEH 108-113; BT 599-605). He asked his mother to come right home after work because no one was going to be home since he and his dad were going to a baseball game. Jeffrey then passed the phone over to his father. Ronald Powell and the Respondent discussed the house at which they had looked. Ronald described in detail a 300-acre ranch that he liked and thought he could buy even though the monthly payments would be $11,000. He also said that he was going to be busy and so wouldn't be home when she got there. During the conversation which lasted about four minutes, the following colloquy took place:

"BIN: Dan, and I know you didn't like it too much, and I loved it. Anyhow, that's the way it goes. I saw one today that I think you'll like. I left--I'm leaving a sheet on the bed. I'm also leaving a package for Dan on the bed.

BETTY: Okay.

BIN: And a note about it. He's going to come right after you get here, so you got to hurry home.

BETTY: Okay. I will. ...." (BEH 108; BT 602).

The sheet mentioned was a sheet from the real estate broker describing the home (RT 690). This conversation formed the basis for Count V.

The Respondent's Arrest - Counts VII - XIV[6]

On 23 April 1982, Ronald and Jeffrey Powell found out that their phones were tapped (RT 687-691). At the time the Respondent was not at the house but was out to dinner with her young son Michael (RT 895). Ronald Powell, who was in Los Angeles, instructed Jeffrey to "clean up" the house (RT 895). Jeffrey put the things he gathered up into the garage and waited for his mother to come home (RT 896). When the Respondent got home Jeffrey told her there was trouble and she had to leave and go to Los Angeles (RT 896, 1006). While the Respondent was in the house packing her clothes and effects, Jeffrey loaded the things he had gathered up into the trunk of the Respondent's car (RT 896).

When the surveilling agents learned that Ronald Powell had discovered the tap, other agents were sent to the Powell home (RT 49). Just as they arrived at the home, the Respondent was leaving with Michael in the car (RT 31, 1147, 78). The F.B.I. agents in plain clothes and driving unmarked sedans were telling at the Respondent that they were F.B.I. agents and that she should pull over (RT 92-93).

The agents finally thought they had cornered the Respondent in a left-hand turn lane on a major thoroughfare just off a freeway (RT 94). The agents, some with guns drawn but some with badges exposed (RT 94, 93, 84), ran up to the Respondent's locked car which was stopped at a red light and began banging on it and ordering the Respondent out (RT 1147). The Respondent drove away, striking one agent in the leg and almost hitting another (RT 95-96, 54 (Counts VII and VIII).

6/ The Respondent was acquitted on Count VI, a telephone count, which charged her with making airline reservations on 23 April 1982 for her husband in the name of Charles Dixon (RT 619-621), but was convicted of the false official statement (Count IV).

A uniformed San Diego police officer, on duty in a marked police cruiser, witnessed this scene from across the street (RT 1147-1148). The Respondent's car, making a U-turn, almost hit the officer's car which had its overhead lights flashing (RT 1149). The officer pulled in behind and followed the Respondent. She pulled over after traveling about one-half mile, apparently looking for a place to stop (RT 1150-1152). The F.B.I. agents who had returned to in their cars and followed, ran up to the Respondent's car where the police officer, "not knowing who those gentlemen were ... pushed them out of the way and told them to back off" (RT 1152). The police officer took the Respondent into custody and then surrendered her to the agents after the agents showed identification (RT 1153, 1155-1156).

A search warrant was obtained to search the trunk of the car and a search was conducted on 24 April 1982 (RT 229). The search uncovered approximately 2 kilograms of cocaine (Count IX), 3,700 quaalude pills (Counts II and X), two silencers (Counts XI and XII), and a machine pistol (Counts XIII and XIV). The search also uncovered an electronic scale, some fake cocaine, a plastic bag sealer, $31,000 in cash and a bag of dog chow (RT 395, 312-323).

The Defense at Trial

The testimony of the Respondent and the taped telephone calls showed that she was a 46-year-old mother, course of speech, whose family treated her with little respect (RT 410, 684, 812-659). Her oldest son was uncontrollable, and she had sued her husband for divorce three different times but had always withdrawn the suits (RT 324-325, 1057).

The Respondent was working for a publishing company for approximately one month prior to her arrest (RT 1037-1038). Before moving to San Diego in September 1981, she had worked for a publishing company in the Los Angeles area for four years (RT 1036-1037). The Respondent was well respected by her employer and friends, four of whom testified as character witnesses for her (RT 886, 916, 1136, 1140). From 1978-1980, the Respondent was actively involved in school affairs and enjoyed a reputation

as an upstanding and law abiding citizen. (RT 910-910). The Respondent had no prior criminal history (RT 1026).

Defense counsel also called Jeffrey Powell as a witness, and he exonerated the Respondent (RT 881, 890, 901, 902, 911, 917). However, Jeffrey, who had pleaded guilty as a juvenile to his involvement in the conspiracy before another judge shortly before Respondent's trial (RT 923-924), was also being represented by Respondent's attorney. The prosecutor when cross-examining Respondent's son drew out that the defense attorney represented both the witness and Respondent.[7] (RTP 122-123; RT 914-920).

The defense conceded the existence of the conspiracy, and that the Respondent may have known what was going on. However, the defense denied that the Respondent willfully participated in the conspiracy or assisted it (RT 1283-85). The Respondent testified repeatedly she did not knowingly assist in the distribution of drugs in any way (e.g. RT 1315). The Respondent, unaware she was being taped, summarized in her own street language her non-involvement: "I've got a regular job and I don't want no part of none of this shit" (RT430); and "This ain't my business, you know. Ain't my movie." (RTP 105, RT 478).

REASONS FOR NOT GRANTING THE PETITION

1. The court of appeals reversed the telephone counts (Counts III, IV, and V) for insufficiency of evidence, and this court is not an appropriate issue for the review of the sufficiency of evidence.

The Government has created the issue of inconsistent verdicts. Throughout its brief the Government distinguishes a reversal for sufficiency of the evidence from cases where the

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7/ The prosecutor asked, "Mr. Prantil [defense counsel] is in contact with your father [Ron Powell], isn't he? [RT 915] The defense objection was sustained, but Government counsel exhibited peculiar prescience to the basis of defense counsel's subsequent prosecution. Supra p. 2-3. If Government counsel was aware of a conflict of interest between defense counsel's divided loyalty between the Respondent and her fugitive husband, was not there the duty to bring it to the attention of the trial court?

evidence was sufficient (i.e. Harris v. Rivera, 101 S.Ct. 460 (1981))[8] but the verdicts inconsistent.

Their syllogistic conclusion hinges on the proposition that jury's determination of guilt (Pet.Br. 13) is irreviewable. The court of appeals decision is characterized as "confused."[9] The language of the opinion is to the contrary. The express holding was:

> We have reviewed the record and we are not convinced that there is evidence to support the government's claim that "someone other than" the conspirators named in Count I had possession and that appellant's telephone calls facilitated that possession. Thus, on the facts of this case, we must reverse the convictions as to Counts 3, 4, and 5[10]. (App. 2a) (Emphasis added).

The same issues raised in the petition for certiorari were raised in the Government's petition for rehearing. Again, the answer of the Court of Appeals:

> "We adhere to our statement in our opinion that there is insufficient evidence to support the convictions on Counts 3, 4, and 5. (App.8a)

The telephone counts referred to two predicate offenses: conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. The jury had acquitted on the charged conspiracy to possess with intent to distribute cocaine (Count 1) and the charged possession with intent to distribute cocaine (Count 2) (CT 30). The court of appeals looked for evidence of a conspiracy beyond that charged in the indictment, but the court of appeals reviewed the evidence as presented by the Government at trial. When the Government presented no worthy evidence of "any act or acts

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8/ "[A]ll agree that the record contains adequate evidence of guilt." 102 S.Ct. 460, 461. See also United States v. Gutierrez-Farias, 320 U.S. 277, 278 (1963) ("We start with the finding of the Circuit Court of Appeals that the evidence was adequate to support the verdict of adulteration and misbranding.")

9/ Pet. Br. 14 n. 22.

10/ The court then cites United States v. Dailey, 607 F.2d 237, 241 (9th Cir. 1979) cert. den. 445 U.S. 934 (1980), which the Government acknowledged "involved a conventional challenge to the adequacy of the Government's proof." (Pet. Br. 14 n.22)

constituting a felony [under the Controlled Substances Act] (21 U.S.C. §843(b)), the conviction had to be reversed for insufficiency.

II. The facilitation offense, the telephone count, is analogous to the conspiracy exception to the abrogation of inconsistent verdicts.

In Dunn v. United States 307 U.S. 143, 882 n. 5 (1966) the court acknowledged the common law rule that a person could not be convicted of conspiracy without proof of co-conspirators:

> "Petitioners co-defendants -- Moriarty, an attorney, and Diller, the stenographer -- were found guilty on counts 1 & and 7. But the trial judge set aside Moriarty's conviction on a motion for new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Diller's conviction was set aside by the court below on the ground there was no proof that he knew what was petitioner made of the pamphlets. Moriarty and Diller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count."

In Count 1, the cocaine conspiracy, the Government alleged the Respondent did "combine, conspire and agree with unindicted co-conspirators Ronald Lee Powell and Jeffrey Scott Powell and with divers other persons known and unknown to the Grand Jury." (ER8 2)[11] The proof of the conspiracy does not require the conviction of unindicted co-conspirators Ronald Powell, the Respondent's husband, or Jeffrey Powell, the Respondent's son.[12] The Government had to establish proof that the Respondent was a conspirator. The defense acknowledged in the trial court that a conspiracy existed between Ron and Jeffrey, but denied Respondent's connection with their

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11/ Count II, the other conspiracy dealt with quaaludes, and that conspiracy was "with divers other persons known and unknown to the Grand Jury." (ER8 6)

12/ Jeffrey Scott Powell plead guilty and admitted being a juvenile delinquent for these cocaine conspiracy activities (ER7 913), and Ronald Powell after a plea of guilty to cocaine conspiracy received 11 years confinement from the same District Court Judge (E.D. Cal. No.82-0020-S (2 May 1983))

illicit activities. In Garland the conviction of the conspirators without valid convictions of the other conspirators could not stand, because of the lack of evidence of involvement with the others named as conspirators. The Government is given wide latitude by the appellate courts to use the standard language "with divers other persons known and unknown to the Grand Jury," but the proof must establish that conspiracy. The response of the court of appeals was:

> We have reviewed the record and we are not convinced that there is evidence to support the government's claim that 'persons other than' the conspirators named in Count 1 had possession and that appellant's telephone calls facilitated that possession." (Appendix 2a).

Standefer v. United States 447 U.S. 10 (1980) did not overrule or modify Garland, but found that the aider and abettor could be convicted if the principal was acquitted because of the unique legislative history overruling the common law rule that would have otherwise precluded such a conviction.

III. Proof of the predicate offense, the conspiracy to possess with intent to distribute cocaine, was not established, and certain proof as to an essential element, the interstate count had to be reversed.

To have a violation of a telephone count (21 U.S.C. §843(b)) there must be proof that the defendant knowingly or intentionally used a communication facility "in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." The three telephone counts used conjunctively the statutory language: "committing," the "causing" and the "facilitating" of a controlled substance offense (singular) and then described duplicitously the "offense" as a conspiracy to possess within intent to distribute and possession with intent to distribute cocaine. The court of appeals, giving the Government the benefit of the doubt, was willing to look beyond the cocaine conspiracies charged (Count 1 and ER) upon which the jury acquitted the defendant, but it found no facts supporting this position. When the three telephone counts were positively connected as overt acts in the cocaine conspiracy

Count II to which the jury acquitted, the court of appeals was then left with a telephone count, which although approved by the jury, was fatally lacking an essential element -- "a felony under any provision of this subchapter." (21 U.S.C. §843(b), or,

c. The three telephone counts failed to state an offense and failed to give adequate notice to the respondent of that which she was charged.[13]

The two requirements of sufficiency for a federal criminal charge set forth in Russell v. United States, 369 U.S. 749, 763-4 (1962), are:

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet;' and secondly, in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (Emphasis added).

In this case although the indictment identifies a specific date and time of the act, it gives no notice of the nature of the offense which was "facilitated." The pleading might have read the commission of a controlled substance offense a violation of Title 21, United States Code, Sections 843-844. In this case the reference to sections 841 (conspiracy) and section 841(a)(1) (possession with intent to distribute a controlled substance) narrowed the charge which in the context of other charged offenses should have reference to them (omitting a detail). Otherwise, it would be fatally defective for lack of notice or, error, potentially derogation. The court of appeals noted this "unfortunate" drafting. (Appendix A). If the case were to be reviewed by this court, the issue should be given-out and not burdened with the complexities of poor draftsmanship.

13/ Although Rule 12(b)(2) Fed.R.Crim.Proc. would preclude the challenge on the grounds of duplicity (among two different conspirations), the failure to charge an offense may be noticed "at any time during the pendency of the proceedings." This court may also consider plain error. Fed.R. Rule 52(b).

V. The trial proceedings in which respondent was represented by incompetent counsel with a patent conflict of interest were not fairly conducted.

Respondent's brief in the court of appeals was filed in November 1982, but the criminal action against defense counsel for his involvement with Ronald Powell was not filed until 26 April 1983. (See Appendix A)[14] In the court of appeals different counsel asserted that the Respondent was denied her Sixth Amendment right to the effective assistance of counsel because of the prejudice resulting from the cumulative impact of the multiple instances of incompetence of her trial attorney. The arguments raised but rejected by the Court of Appeals were:

A. COUNSEL'S FAILURE TO ADEQUATELY PRESENT THE MOTIONS TO SUPPRESS EVIDENCE WAS INCOMPETENCE.

1. Defense Counsel Failed to Present the one Pertinent Legal Argument for Suppression of the Wiretap Evidence.

2. The Motion to Suppress Evidence Seized from the Defendant's Residence Should Have been Granted.

B. DEFENSE COUNSEL'S FAILURE TO REQUEST A SEVERANCE OF COUNTS WAS INCOMPETENT.

C. COUNSEL FAILED TO SUBMIT ANY REQUEST FOR VOIR DIRE EXAMINATION.

D. COUNSEL'S CONFLICT OF INTEREST IN REPRESENTING THE DEFENDANT JEFFREY POWELL CAUSED HIM TO INCOMPETENTLY REPRESENT THE DEFENDANT.

E. COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION BAILEY AND PARKER ISSUE WAS INCOMPETENCE.

F. COUNSEL'S ERRONEOUS ARGUMENT OF THE "1 HYPOTHESIS" TEST DEMONSTRATED HIS IGNORANCE OF THE BASIC LAW OF THIS CIRCUIT AND HIS INCOMPETENCE.

G. COUNSEL FAILED TO PROVIDE READILY AVAILABLE AUTHORITY TO THE TRIAL COURT AS TO THE RULE 29 MOTION DESPITE A SPECIFIC REQUEST FOR SUCH AUTHORITY (Appellant's Brief 33-46).

14/ The indictment on its face indicates that it was "Ancillary to 282-0377-E," which is the instant case involving Betty Lou Powell. Although the Respondent does have a potential motion to vacate, set aside or correct sentence (28 U.S.C. 2255), the respondent must exhaust her remedies on direct review before proceeding on a collateral attack. This same issue will be raised in the Respondent's Petition for Certiorari reviewing her conviction for false statement, but it is presented to the court as a serious deficiency in the trial of this case that should preclude the granting of certiorari.

The subsequent development of defense counsel's actual assistance furnished the fugitive Ronald Lee Powell demonstrates a patent conflict of interest that was not explored by the district court. The loyalty of defense counsel ran to the fugitive, and that loyalty resulted in a criminal conviction of the trial defense attorney. Once a conflict of evidence has been established, no prejudice need to be shown to justify a reversal. Glasser v. United States 315 U.S.60 (1942); Holloway v. Arkansas 435 U.S.475 (1978). There was no waiver of the objection, but even without objection an actual conflict existed and her lawyer committed perjury in her case. Cf. Cuyler v. Sullivan 446 U.S. 261 (1981). Given the non-waived conflict of interest this would not appear to be a case appropriate for review to sustain a conviction, but should be grounds for remanding to the court of appeals for reevaluation in light of the now demonstrated conflict.[15] See Wood v. Georgia, 450 U.S. 261 (1981).

VI. This court should not review this case under the concurrent sentence doctrine.

Although the court of appeals reviewed the three telephone count convictions notwithstanding its affirmance of the false statement count (each count had a four year sentence running concurrently), this Court in the use of its very limited resources should be hesitant to apply the rule on behalf of the Government so as to speculate about the impact of he resentencing. Even in argument to the trial jury, the Government acknowledged the "low level" role of the Respondent, but now seeks to justify the extraordinary intervention of this court on the grounds that "enhanced penalty for subsequent offenses" constitutes "significant collateral consequences." (Pet. Br. 9 n. 10)

15/ On 9 June 1982 the superseding indictment adding the false statement count was filed, and on 14 June 1982 the defendant was arraigned on the superseding indictment. (Docket entries) A transcript of this proceeding is not in the record, but there is no writing of the defendant consenting to trial within the 30 day defense period authorized by 18 U.S.C. 3161(c)(2). This defense preparation period also applies to rearraignment. United States v. Ballis No. 83-5051 (9th Cir. 3 February 1984).

The false statement maximum (five years) is greater than the telephone count (four years). Idle speculation would be engaged to measure the influence it might have on a trial judge at a resentencing on the false statement count when that judge imposed all four year sentences concurrent at the outset. Trial judges are given broad discretion at sentencing. To review the conviction of the court of appeals because some of the counts were not affirmed amounts to the grant of "advisory opinions." This court even more so than inferior federal courts, is limited to "cases and controversies" (Constitution of the United States. Art. III, Sec. 2)[16]

CONCLUSION

In a unique factual setting the court of appeals found the Government's proof on the telephone counts inadequate, but affirmed the conviction of the defendant on a concurrent false statement count. The Government's contention that Ward v. United States, 284 U.S. 390 (1931) was violated is inappropriate, and the court of appeals took the unusual step of filing an opinion with the denial of the petition for rehearing to explain the Government's problem of proof. Under these circumstances, the Respondent would suggest that the review of the action of the court of appeal on the three telephone counts is not warranted. In light of the conviction of defense counsel on criminal charges that seriously undermined his professional loyalty to the Respondent in this case, this judgment should be vacated and the case be remanded to the court of appeals pursuant to Wood v. Georgia, supra.

Respectfully submitted,

Dated: 9 April 1984

JOHN JJ CLEARY

Attorney for Respondent

16/ Even if the court granted certiorari its action would not govern the differently worded and unique provisions of the RICO statute (18 U.S.C. 1962), the continuing criminal enterprise (CCE drug count, 21 U.S.C. 848), and the enhanced firearm provision (18 U.S.C. 924(c)). (Pet. Br. 10) Blunderbuss review should be avoided.

EDITOR'S NOTE

PAGES NCA-thru-END WERE POOR HARD COPY AT THE TIME OF FILING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED
APR 20 1981
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

May 1981 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. FRANK G. PRANTIL, aka Bubie Jones, aka F. Gaylord, Defendant.	Criminal Case No. 81 0750 G I N D I C T M E N T (Ancillary to 81-0473-G) Title 18, U.S.C. Sec. 3 - Accessory After the Fact; Title 18, U.S.C. Sec. 1071 - Harboring a Federal Fugitive; Title 18, U.S.C. Sec. 1001 - Cover Up of Material Fact; Title 18, U.S.C. Sec. 1621 - Perjury; Title 18, U.S.C. Sec. 4 - Misprision of Felony

The grand jury charges:

COUNT ONE

Between the dates of on or about April 15, 1981, and on or about August 12, 1981, within the Southern District of California and elsewhere, defendant FRANK G. PRANTIL, aka Bubie Jones, aka F. Gaylord, knowing that Ronald Lee Howell, not here charged, had conspired with others to possess with intent to distribute and to distribute cocaine, a Schedule II Controlled

CFC:mc:San Diego
04/15/81

Sacramento, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, did knowingly and wilfully receive, relieve, comfort and assist Ronald Lee Powell in order to hinder and prevent his apprehension, trial and punishment; in violation of Title 18, United States Code, Section 3.

COUNT TWO

Between the dates of on or about April 19, 1961, and on or about August 12, 1961, within the Southern District of California and elsewhere, defendants CHARLES E. DEWITT, aka Charlie Jones, aka F. England, knowing that a felony warrant for the arrest of Ronald Lee Powell had been issued under the laws of the United States, did knowingly and wilfully harbor and conceal said Ronald Lee Powell so as to prevent his discovery and arrest; in violation of Title 18, United States Code, Section 1071.

COUNT THREE

On or about July 21, 1961, in the Southern District of California, defendant FRANK G. PRANTIL, aka Rubie Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before Grand Jury 83-4, a Grand Jury of the United States District Court for the Southern District of California, did knowingly and wilfully make false material declarations as hereinafter set forth.

At the time and place alleged, Grand Jury 83-4 of the United States District Court for the Southern District of California was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 3, 4, 1071, and Title 21, United States Code, Sections 841 and 846, and other statutes had been committed in the Southern District of California, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

It was material to the said investigation that Grand Jury 83-4 ascertain the amount of money which certain persons had illegally earned in the narcotics business, where that money might be located, and whether the defendant FRANK G. PRANTIL, aka Rubie Jones, aka F. Gaylord, had provided that money or other assistance to Ronald Lee Powell.

At the time and place alleged, defendant FRANK G. PRANTIL, aka Rubie Jones, aka F. Gaylord, appearing as a witness under oath at a proceeding of Grand Jury 83-4, did knowingly declare

//

in response to questions with respect to the material matters alleged in the above paragraph as follows:

Q: But you haven't given him any of the money that you collected?

A: No.

Q: Have you given him any money at any time?

A: Never.

Q: Have you given him any money that you collected from anybody else to give to him?

A: No.

* * * *

Q: . . . . Aside from giving advice about keeping the family together and sending Mike to St. Louis, have you done anything else for Ron Powell?

A: No, I haven't. I haven't given him any money.

The underscored portions of the declarations quoted in the above paragraph made by defendant FRANK G. PRANTIL, aka Rubie Jones, aka F. Gaylord, were material to the said investigation and, as he then and there well knew, were false; in violation of Title 18, United States Code, Section 1623.

COUNT FOUR

On or about July 21, 1983, in the Southern Division of California, defendant PEGGY G. PROVIL, aka Bubie Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before Grand Jury 83-4, a Grand Jury of the United States District Court for the Southern District of California, did knowingly and wilfully make false material declarations as hereinafter set forth.

At the time and place alleged, Grand Jury 83-4 of the United States District Court for the Southern District of California was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 2, 4, 371, and Title 21, United States Code, Sections 841 and 846, and other statutes had been committed in the Southern District of California, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

It was material to the said investigation that Grand Jury 83-4 ascertain the amounts of money which certain persons had illegally earned in the narcotics business, where that money might be located, where it may have been located in the past, where it may have been collected by the defendant PEGGY G. PROVIL, aka Bubie Jones, aka F. Gaylord, and whether that money or other assistance had been provided to Ronald Lee Howell.

At the time and place alleged, defendant PEGGY G. PROVIL, aka Bubie Jones, aka F. Gaylord, appearing as a witness under oath at a proceeding of Grand Jury 83-4, did knowingly declare

in response to questions with respect to the material matters alleged in the above paragraph as follows:

Q: What were these power of attorneys for?

A: To obtain monies.

Q: From banks?

A: Safety deposit boxes.

* * * *

Q: And you find money in those boxes?

A: Yes.

* * * *

Q: Was there any other places that you went to collect money to pay attorney fees?

A: No, no.

Q: So those three banks, plus the Great Western Savings & Loan?

A: That's correct.

* * * *

Q: Aside from the three banks you mentioned, the two in El Cajon and the one in Los Angeles, are there any other places that you collected money for Ron Howell?

A: No. Collected for me?

Q: Collected your attorney's fees or whatever?

A: That's right.

Q: You never collected any money for Ron Howell?

A: No.

The underscored portions of the declarations quoted in the above paragraph, made by defendant PEGGY G. PROVIL, aka Bubie

Jones, aka F. Gaylord, were material to the said investigation and, as he then and there well knew, were false in violation of Title 18, United States Code, Section 1623.

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COUNT FIVE

On or about July 21, 1953, in the Southern District of California, defendant PAUL E. PRATTO, aka Rubio Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before Grand Jury 53-4, a Grand Jury of the United States District Court for the Southern District of California, did knowingly and wilfully make false material declarations as hereinafter set forth.

At the time and place alleged, Grand Jury 53-4 of the United States District Court for the Southern District of California was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 3, 4, 371, and Title 21, United States Code, Sections 841 and 846, and other statutes had been committed in the Southern District of California, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

It was material to the said investigation that Grand Jury 53-4 ascertain the identities and services of the individual or individuals who associated with, had knowledge of, and participated in the activities of Ronald Lee Dowell, Jack Skidmore, and the defendant PAUL E. PRATTO, aka Rubio Jones, aka F. Gaylord, during an occasion when the defendant PAUL E. PRATTO, aka Rubio Jones, aka F. Gaylord, travelled to Bakersfield, California.

At the time and place alleged, defendant PAUL E. PRATTO, aka Rubio Jones, aka F. Gaylord, appearing as a witness under

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court on a proceeding before Grand Jury 82-4, did knowingly declare in response to questions with respect to the material matters alleged in the above paragraph as follows:

Q: . . . . Jack Skidmore, have you ever met him?

A: No.

o o o o

Q: Now, since April 15, have you had any meetings with Ron Powell?

A: Yeah.

o o o o

Q: Where were they? Start with the first one.

A: The first one was in Bakersfield.

o o o o

Q: Who picked you up?

A: I don't remember who it was.

The underscored portions of the declarations quoted in the above paragraph, made by defendant FRANK G. PRATTIL, aka Rubie Jones, aka F. Gaylord, were material to the said investigation and, as to them and their well knew, were false; in violation of Title 18, United States Code, Section 1623.

COUNT SIX

On or about July 21, 1982, in the Southern District of California, defendant FRANK G. PRATTIL, aka Rubie Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before Grand Jury 82-4, a Grand Jury of the United States District Court for the Southern District of California, did knowingly and wilfully make false material declarations as hereinafter set forth.

At the time and place alleged, Grand Jury 82-4 of the United States District Court for the Southern District of California was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 3, 4, 1071, and Title 21, United States Code, Sections 841 and 846, and other statutes had been committed in the Southern District of California, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

It was material to the said investigation that Grand Jury 82-4 ascertain the identities and motives of the individual or individuals who associated with, had knowledge of, and participated in the activities of Ronald Lee Powell, Melvina Ann Schmidt, and the defendant FRANK G. PRATTIL, aka Rubie Jones, aka F. Gaylord, during an occasion when the defendant FRANK G. PRATTIL, aka Rubie Jones, aka F. Gaylord, travelled to Omaha, Nebraska.

At the time and place alleged, defendant FRANK G. PRATTIL, aka Rubie Jones, aka F. Gaylord, appearing as witness under oath

in a proceeding before Grand Jury 82-4, did knowingly declare in response to questions with respect to the material matters alleged in the above paragraph as follows:

Q: . . . getting back to the meeting in Ohaha. Who was there when you got to Ohaha?

A: This time a female picked me up.

Q: Who was she?

A: I don't know.

* * * *

Q: And when you left him, how did you get back to the Holiday Inn or the Airport?

A: I was driven back.

Q: By Ron or this lady?

A: The lady.

Q: And you don't know who she is?

A: No.

Q: Name has never come up in any of the discovery?

A: She's not involved. Apparently she's a friend of his. I don't know.

The underscored portions of the declarations quoted in the above paragraph, made by defendant FRANK G. FRANTIL, aka Rubio Jones, aka F. Gaylood, were material to the said investigation and, as he then and there well knew, were false; in violation of Title 18, United States Code, Section 1623.

COUNT SEVEN

On or about August 5, 1982, within the Southern District of California, defendant FRANK G. FRANTIL, aka Rubio Jones, aka F. Gaylood, did knowingly and wilfully falsify, conceal, and cover up by means of a trick, scheme, and device a material fact in a matter within the jurisdiction of the United States Courts, an agency and department of the United States, in that he presented to Lynn Hinaka, Deputy Clerk, United States District Court, papers purporting to be a complete corporate surety bond in the amount of $100,000, whereas in truth and in fact, as he then well knew, the bond was not complete because the bail bond insurance company had refused to sign and agree to the proposed bond; in violation of Title 18, United States Code, Section 1001.

COUNT EIGHT

On or about August 6, 1982, within the Southern District of California, defendant FRANK G. PRATTI, aka Rubio Jones, aka F. Gaylord, did knowingly and wilfully falsify, conceal, and cover up by means of a trick, scheme, and device a material fact in a matter within the jurisdiction of the United States Courts, an agency and department of the United States, in that he presented to Lynn Rimata, Deputy Clerk, United States District Court, papers purporting to be a complete corporate surety bond in the amount of $100,000, whereas in truth and in fact, as he then well knew, the bond was not complete because the bail bond insurance company had refused to sign and agree to the proposed bond; in violation of Title 18, United States Code, Section 1001.

COUNT NINE

On or about October 6, 1982, in the Southern District of California, defendant FRANK G. PRATTI, aka Rubio Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the United States District Court for the Southern District of California, entitled United States v. Betty Lou Powell, Criminal No. 82-0370-G, did knowingly and wilfully make false material declarations as hereinafter set forth.

At the time and place alleged, the court was engaged in examining sureties for a proposed appellate bond to identify the source of collateral for said proposed bond.

It was material to said proceeding to ascertain whether defendant FRANK G. PRATTI, aka Rubio Jones, aka F. Gaylord, had ever obtained from or given to Ronald Lee Powell large amounts of cash or other collateral.

At the time and place alleged, defendant FRANK G. PRATTI, aka Rubio Jones, aka F. Gaylord, while under oath, did knowingly declare before said court with respect to the material matters alleged in the above paragraph as follows:

Q: Have you ever held any money for Ron Powell?

A. Some.

Q: How much?

* * * *

A: Well, I never held any money for him. I spent some money for attorney's fees and costs in his wife's case, as

//

until he has one's case, but I haven't--you know. I haven't given him any money or held any money for him.

* * * *

Q: You have never returned any of the money to Ron Powell?

A: No.

Q: Have you given it to anyone on his behalf?

A: No.

The underscored portions of the declarations quoted in the above paragraph, made by defendant PEGGY O. PROFFIT, aka Rubie Jones, aka F. Gaylord, were material to the said investigation and, at he then and there well knew, were false; in violation of Title 18, United States Code, Section 1623.

COUNT TEN

On or about October 6, 1981, in the Southern District of California, defendant PEGGY O. PROFFIT, aka Rubie Jones, aka F. Gaylord, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the United States District Court for the Southern District of California, entitled United States v. Betty Lou Powell, Criminal No. 82-0373-G, did knowingly and willfully make false material declarations as hereinafter set forth.

On the time and place alleged, the court was engaged in conducting hearings for a proposed appearance bond to identify the source of collateral for said proposed bond.

It was material to the said proceeding to ascertain whether, during a previous attempt to post a bond, the defendant PEGGY O. PROFFIT, aka Rubie Jones, aka F. Gaylord, had suggested that cash be secretly substituted for the collateral for the proposed bond which had been presented to the court and whether an individual or individuals were requested to lie about the ultimate source of collateral, if inquiry concerning the source of collateral were ever made.

On the time and place alleged, defendant PEGGY O. PROFFIT, aka Rubie Jones, aka F. Gaylord, appearing as witness under oath, did knowingly declare before said court with respect to the material matters alleged in the above paragraph as follows:

Q: Did you ask Betty Brown's supervisor to have her instructed to lie about the source of the collateral?

A: No.

Q: Your answer is no?

A: If I ever had any conversation with Kathy Brown or anybody else, I said "Hey, this is above the board. You are going to--you have to tell the truth, whatever is involved in this thing." There wasn't anything involved--there was never any money involved. The only thing that was involved was the property that I put up.

The underscored portions of the declarations quoted in the above paragraph, made by defendant FRANK G. FRANTIL, aka Hubie Jones, aka F. Gaylord, were material to the said investigation and, as he then and there well knew, were false; in violation of Title 18, United States Code, Section 1623.

COUNT ELEVEN

Between the dates of on or about April 23, 1982, and on or about August 10, 1982, within the Southern District of California and elsewhere, defendant FRANK G. FRANTIL, aka Hubie Jones, aka F. Gaylord, knowing that Ronald Lee Powell, not here charged, had actually conspired with others to possess with intent to distribute and to distribute cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, did knowingly and wilfully conceal and fail to make known as soon as possible to authorities of the United States facts and physical evidence of that offense; in violation of Title 18, United States Code, Section 4.

DATED: April 26, 1983

A TRUE BILL:

For person

Peter K. Nunez
United States Attorney

By: CHARLES V. GORDER, JR.
Assistant U.S Attorney

JUDGMENT AND COMMITMENT (Rev. 3-68) Cr. Form No. 35

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

FILED
JAN 25 1984
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

United States of America

v.

FRANK G. PRANTIL (1)

No. 83-0368-GT-Crim

On this 23rd day of January, 1984 came the attorney for the government and the defendant appeared in person and by counsel, Eugene Iredale.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offenses of being an accessory after the fact to the crime of conspiracy to possess cocaine with intent to distribute in violation of 21 USC 841(a)(1), 846 and 18 USC 3 as charged in count 1; perjury in violation of 18 USC 1623 as charged in each of counts 3, 4, 6, 9 and 10 and covering up a material fact in violation of 18 USC 1001 as charged in each of counts 7 and 8 of the indictment in 11 counts and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on each of counts 1, 3, 4, 6, 7, 8, 9 and 10 the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on counts 1, 3, 6, 7 and 9 to run concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years and pursuant to 18 USC 4205(b)(2) the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the United States Parole Commission.

IT IS ADJUDGED that on counts 4, 8 and 10 to run concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years; execution of sentence is suspended and defendant is placed on probation for a period of five (5) years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that he not possess or use narcotics, marihuana, LSD or dangerous drugs in any form, that he not associate with any known users of or dealers in narcotics, marihuana, LSD or dangerous drugs in any form and that if directed by his Probation Officer, he participate in a drug abuse treatment program upon his release from imprisonment.

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APPENDIX B

83-0368-GT-Crim U.S.A. vs FRANK G. PRANTIL (1)

IT IS ORDERED that the sentence imposed on counts 4, 8 and 10 is consecutive to the sentence imposed on counts 1, 3, 6, 7 and 9 and that the period of probation imposed shall commence when the defendant is released from imprisonment.

IT IS FURTHER ORDERED that the sentences imposed in this case are consecutive to the State sentence imposed upon the defendant.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GORDON THOMPSON, JR.
United States District Judge
Filed: January 23, 1984
William M. Alsup, Clerk
By: V.C. Hamlin, Deputy

WILLIAM M. LOWRY
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOINT

APPENDIX

Office Supreme Court, U.S.
FILED
JUL 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1307

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 7, 1984
CERTIORARI GRANTED MAY 21, 1984

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*The opinion of the court of appeals is printed in the appendices to the petition for writ of certiorari and has not been reproduced.

**RELEVANT DOCKET ENTRIES,
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
DOCKET NO. CR-82-00373-01**

April 26, 1982	Filed magistrate complaint (MAG INFANTE)
May 5, 1982	Filed indictment
May 6, 1982	Arraignment held (Counts 1-13)
	Defendant enters plea of not guilty (Counts 1-13)
June 9, 1982	Filed superseding indictment
June 14, 1982	Arraignment held (Counts S1-S15) (Judge Enright)
	Defendant enters plea of not guilty (Counts S1-S15)
June 16, 1982	Trial begins—jury (Counts 1-13, S1-S15) (Judge Enright)
June 22, 1982	Trial held—jury (2nd day)
June 23, 1982	Trial held—jury [3rd day]
June 24, 1982	Trial held—jury (4th day)
	Motion made in open court for judgment of acquittal (Mot#4) (Counts 1-13, S1-S15) (Deft's. motion)
	Motion for judgment of acquittal, and denied (Mot#'s 4, 5) (& to strike & for directed verdict) (Judge Enright)
June 29, 1982	Trial held—jury (5th day)
June 30, 1982	Trial held—jury (6th day)
July 1, 1982	Trial held—jury [7th day]
July 2, 1982	Trial held—jury (8th day)
July 6, 1982	Trial held—jury (9th day)
	Trial ends—jury
	Jury verdict of guilty (Counts S3-S5, S15)
	Jury verdict of not guilty (Counts S1-S2, S6-S14)
July 27, 1982	Sentencing of defendant (Counts S3-S5, S15) (Counts concurrent, impris. for 4 years under 4205(b)(2). (Judge Enright)
	Issued judgment and commitment to U.S. Marshal (Counts S3-S5, S15)
July 30, 1982	Filed notice of appeal (Counts S3-S5, S15) (re final judgment entered on 7-28-82)

RELEVANT DOCKET ENTRIES,
NINTH CIRCUIT COURT OF APPEALS NO. 82-1473

August 3, 1982	Docketed cause and entered appearances of counsel
March 8, 1983	Argued and submitted before: Chambers, Fletcher, Nelson, CJJ.
June 14, 1983	Ordered opinion (Chambers) filed & Judg. to be filed and entered Filed opinion—affirmed in part, reversed in part and remanded Filed and entered judgment
June 23, 1983	Filed motion & order (dep clerk for ct) granting aple (USA) an ext of time in which to file petition for rehearing to July 28, 1983 (panel)
July 23, 1983	Filed orig & appellee's PETITION FOR REHEARING 9 pages 7/27/83 (panel)
November 14, 1983	Filed, as of November 10, 1983, order (Chambers, Fletcher, & Nelson, CJ) on Government's PETITION FOR REHEARING IS DENIED
February 12, 1984	RECVD SC notice of filing petition for cert on 2/7/84

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1981 Grand Jury

Criminal Case No. 82-0373-E
(Superseding)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BETTY LOU POWELL, DEFENDANT

INDICTMENT

Title 21, U.S.C., Sec. 846—Conspiracy to Possess With Intent to Distribute a Controlled Substance; Title 21, U.S.C., Sec. 843(b)—Unlawful Use of a Communication Facility; Title 18, U.S.C., Secs. 111 and 1114—Assault on a Federal Officer with a Dangerous Weapon; Title 21, U.S.C., Sec. 841(a)(1)—Possession of a Controlled Substance with Intent to Distribute; Title 26, U.S.C., Sec. 5861(d)—Possession of Unregistered Firearm; Title 26, U.S.C., Sec. 5861(i)—Possession of Firearm Not Identified by Serial Number; Title 18, U.S.C., Sec. 1001—False Statements

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The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including April 23, 1982, within the Southern District of California, and elsewhere, defendant BETTY LOU POWELL did knowingly and intentionally combine, conspire, and agree with unindicted co-conspirators Ronald Lee Powell and Jeffrey Scott Powell and with divers other persons known and unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed within the Southern District of California and elsewhere:

1. On or about April 11, 1982, at approximately 8:02 p.m., within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with her son, Jeff, about calling an illegal drug customer and asking him for payment.

2. On or about April 11, 1982, at approximately 8:10 p.m., within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with Sandy Segal about payment for illegal drugs.

3. On or about April 16, 1982, at approximately 4:19 p.m., within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with Ron Powell concerning drugs to be left for "Sam".

4. On or about April 20, 1982, at approximately 7:15 a.m., within the Southern District of California, defendant BETTY LOU POWELL called TransWorld Airlines about a reservation for Ron Powell, travelling under the false name of Chuck Dixon.

5. On the evening of April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL drove a 1981 Lincoln Continental, which contained approximately 2,013.2 grams of cocaine.

6. On April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL had possession of United States passports for Ronald Lee Powell and Jeffrey Scott Powell.

COUNT TWO

Beginning at a date unknown to the grand jury and continuing up to and including April 23, 1982, within the Southern District of California, and elsewhere, defendant BETTY LOU POWELL did knowingly and intentionally combine, conspire, and agree with divers other persons known and unknown to the grand jury to commit offenses

against the United States, namely, to knowingly and intentionally possess with intent to distribute quaaludes, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACT

In pursuance of said conspiracy and to further the objects thereof, the following overt act, among others, was committed within the Southern District of California, and elsewhere:

1. On the evening of April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL drove a 1981 Lincoln Continental containing approximately 2,700 dosage units of quaaludes.

COUNT THREE

On or about April 11, 1982, at approximately 8:02 p.m., within the Southern District of California, defendant BETTY LOU POWELL did knowingly and intentionally use a communication facility, namely, a telephone, in committing and in causing and facilitating the commission of a controlled substance offense, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), that is, conspiracy to possess with intent to distribute and possession with intent to distribute cocaine; in violation of Title 21, United States Code, Section 843(b).

COUNT FOUR

On or about April 11, 1982, at approximately 8:10 p.m., within the Southern District of California, defendant BETTY LOU POWELL did knowingly and intentionally use a communication facility, namely, a telephone, in committing and in causing and facilitating the commission of a controlled substance offense, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), that is, conspiracy to possess with intent to distribute and possession with intent to distribute cocaine; in violation of Title 21, United States Code, Section 843(b).

COUNT FIVE

On or about April 16, 1982, at approximately 4:19 p.m., within the Southern District of California, defendant

BETTY LOU POWELL did knowingly and intentionally use a communication facility, namely, a telephone, in committing and in causing and facilitating the commission of a controlled substance offense, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), that is, conspiracy to possess with intent to distribute and possession with intent to distribute cocaine; in violation of Title 21, United States Code, Section 843(b).

COUNT SIX

On or about April 20, 1982, at approximately 7:15 a.m., within the Southern District of California, defendant BETTY LOU POWELL did knowingly and intentionally use a communication facility, namely, a telephone, in committing and in causing and facilitating the commission of a controlled substance offense, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), that is, conspiracy to possess with intent to distribute and possession with intent to distribute cocaine; in violation of Title 21, United States Code, Section 843(b).

COUNT SEVEN

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL, wilfully by means and use of a deadly and dangerous weapon, to wit, an automobile, did forcibly assault, resist, oppose, impede and interfere with Eugene Riehl and Jack Blair, Special Agents of the Federal Bureau of Investigation, while said Eugene Riehl and Jack Blair were engaged in the performance of their official duties; in violation of Title 18, United States Code, Sections 111 and 1114.

COUNT EIGHT

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL, wilfully by means and use of a deadly and dangerous weapon, to wit, an automobile, did forcibly assault, resist, oppose, impede and interfere with Clyde Fuller, a Special Agent of the Federal Bureau of Investigation, while said Clyde Fuller was engaged in the performance of his official duties;

in violation of Title 18, United States Code, Sections 111 and 1114.

COUNT NINE

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly and intentionally possess, with intent to distribute, approximately 2,013.2 grams of cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT TEN

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly and intentionally possess, with intent to distribute, approximately 2,700 dosage units of quaaludes, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT ELEVEN

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly possess firearms, that is, two silencers, which had not been registered and licensed to her in the National Firearms Registration and Transfer Record, as required by Title 26, United States Code, Section 5841; in violation of Title 26, United States Code, Section 5861(d).

COUNT TWELVE

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly possess firearms, to wit, two silencers, which did not bear serial numbers as required by Title 26, United States Code, Section 5842; in violation of Title 26, United States Code, Section 5861(i).

COUNT THIRTEEN

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly possess a firearm, that is, a machine gun, which had not been registered and licensed to her in the National

Firearms Registration and Transfer Record, as required by Title 26, United States Code, Section 5841; in violation of Title 26, United States Code, Section 5861(d).

COUNT FOURTEEN

On or about April 23, 1982, within the Southern District of California, defendant BETTY LOU POWELL did knowingly possess a firearm, to wit, a machine gun, which did not bear serial numbers as required by Title 26, United States Code, Section 5842; in violation of Title 26, United States Code, Section 5861(i).

COUNT FIFTEEN

On or about April 26, 1982, within the Southern District of California, defendant BETTY LOU POWELL wilfully and knowingly did make a false, fictitious and fraudulent statement and representation, both orally and in writing, as to a material fact in a matter within the jurisdiction of the United States courts, an agency of the United States, in that she did represent and state to Magistrate Edward A. Infante that she had approximately $400.00 in all of her bank accounts, whereas in truth and in fact, as she then well knew, that statement and representation was false, fictitious and fraudulent when made; in violation of Title 18, United States Code, Section 1001.

DATED: June 9, 1982.

A TRUE BILL:

/S/ _____
FOREMAN

/S/ _____
PETER K. NUNEZ
United States Attorney

EXCERPT OF TRIAL, JUNE 23, 1982

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[466] [AUSA Gorder]: Was there another phone call intercepted about half an hour later?

[Agent Bobbitt]: Yes, there was.

Q And that was at approximately 8:02 P.M.?

[467] A Yes. That is correct.

Q And was that an incoming or outgoing call?

A It was an incoming call.

Q And who were the speakers in that particular call?

A Speaker number one is Betty Powell. Speaker number two is an unidentified operator; and speaker number three will be Jeff Powell.

Q Now, Mr. Bobbitt, are you familiar with a grand jury indictment in this case?

A Yes, I am.

Q And does count three refer specifically to a call at 8:02 P.M. on April 11?

A Yes, it does.

Mr. Gorder: Your Honor, this one is identified as number 88.

The Court: All right, you may play it.

(TAPE, GOVERNMENT'S EXHIBIT 88, COMMENCED.)

Betty: "Hello."

Operator: "Will you accept a collect call from Jeff?"

Betty: "Yes."

Jeff: "Mom?"

Betty: "Yeah."

Jeff: "Hi. I'm in Huntington Beach."

Betty: "Yeah."

Jeff: "Dad's plane was two hours late getting in."

[468] Betty: "Uh-huh."

Jeff: "And then customs took an hour."

Betty: "I believe it."

Jeff: "So we'll be home about ten o'clock."

Betty: "Yeah. I figured that. Remember, I told you?"

Jeff: "Yeah. I should have left the house when I was supposed to pick him up."

Betty: "Yeah."
Jeff: "And I would have gotten there in time to pick him up."
Betty: "I know. It's—it's just ridiculous."
Jeff: "I know it is. I'm sitting in that fucking bubble building for three hours is edgy."
Betty: "I know. It's terrible. Once you get in it's hard to get out, anyway."
Jeff: "Yeah. So you get your flowers?"
Betty: "Yes. Thank you. They're beautiful."
Jeff: "And your little bunny rabbit?"
Betty: "Yeah. I love it."
Jeff: "Did Lindley get hers?"
Betty: "Yeah. That's what I wrote on the note, that she called this morning to thank you for it."
Jeff: "Oh, 'cause they told me that she might not get them today, and—"
Betty: "No. You know what I think is so funny is they [469] delivered her's at like 9:30 this morning."
Jeff: "You know what they told me? That they might not be able to give her's today because they're so swamped."
Betty: "Yeah. Well, that shows you how L.A. is. You know, I should—it shows you the difference between L.A. We get up—we got up to—we got back at like 2:30."
Jeff: "Uh-huh."
Betty: "But we got—oh, let's see. I want you to know Sam never has called."
Jeff: "He called me."
Betty: "Oh, he called you? Oh."
Jeff: "Yeah. You want to do me a favor?"
Betty: "What?"
Jeff: "Call the thin man."
Betty: "Yeah."
Jeff: "Okay. Which his phone number—"
Betty: "Yeah, I know."
Jeff: "And ask him if he has the coupons, and if he does, ask him if—if he could bring them over."
Betty: "If he can bring them."
Jeff: "(unintelligible) coupons to him."
Betty: "Oh, okay."

Jeff: "All right?"
Betty: "If he can bring them over to me."
Jeff: "Yeah."
[470] Betty: "Okay."
Jeff: "All right."
Betty: "All right."
Jeff: "I'll talk to you when I get home."
Betty: "Okay, honey. 'Bye."
Jeff: "'Bye."

(TAPE CONCLUDED.)

By Mr. Gorder:
Q Now, that phone call ended at approximately what time?
A Eight-oh-seven P.M.
Q Now, was there another phone call that occurred three minutes later?
A Yes, there was.
Q That was at 8:10?
A That is correct.
Q And was that an incoming or outgoing call?
A It was an outgoing call.
Q What number was dialed?
A Two-six-five, two-five-oh-two.
Q And who participated in that phone call?
A Sandy Segal was the receiver of the call, and will be speaker number one; and Betty Powell will be speaker number two.
Q And Sandy Segal is the person identified as the thin [471] man on exhibit 49?
A That is correct.
Q And also, count four of the indictment refers to a call at 8:10 P.M. on this date?
A Yes, it does.
Mr. Gorder: Your Honor, we would like to play that call and just identify it as number 89.
The Court: All right. You may play it.

(TAPE, GOVERNMENT'S EXHIBIT 89, COMMENCED.)
Sandy: "Hello."

Betty: "Hi. It's me."
Sandy: "Hi."
Betty: "Listen, did Samuel come by and visit you?"
Sandy: "Yeah. Well, yes and no. I was supposed to go pick it up and I haven't—can I take care of that in the morning?"
Betty: "Well, that's what Ron—they called and he wants all the money home tonight because that was the arrangement Sam made."
Sandy: "Oh, shit."
Betty: "See, that's the problem (unintelligible)."
Sandy: "See—"
Betty: "No, no, last night I—"
Sandy: "Just between me and you, you know—I mean, I can go get it. I just—"
[472] Betty: "I know; but the thing that pisses me off is that last night—"
Sandy: "Get me involved."
Betty: "Yeah, I know. I think—what do you think he did to me last night?"
Sandy: (unintelligible)
Betty: "No. You know what he says to me? He says, 'Well, how—what you going to do tomorrow?' and I said, 'I'm going to take Mike out for a brunch and Easter egg hunt.'"
Sandy: "Right."
Betty: "And he says, 'Well, I'll be over before ten o'clock,' and I said, 'Listen, Sam, I'm sick of messing around with your crap and doing things around you.'"
Sandy: "Yeah."
Betty: "I said, 'From now on, people want to do something, they'll do it around me.'"
Sandy: "Yeah."
Betty: "And I mean it. I'm sick of it, Sandy."
Sandy: "I understand that."
Betty: "You know? I took—"
Sandy: "Ron coming home tonight?"
Betty: "Yeah. Oh, are you ready for this? The plane was two hours late."
Sandy: "Uh-huh."

Betty: "See—see, nobody ever believes me. I don't know [473] nothing. You understand, I told that to Jeff. I said, 'Your dad will be lucky if he's in our driveway by eleven.'"
Sandy: "Yeah."
Betty: "You know, because it's Easter out there and the normal American public basically—not everyone's Jewish. I don't want to be the last one to tell you. You know, most of them go and visit grandma or somebody, or go out for dinner or something, and that highway out there is hell."
Sandy: "Oh, on Easter."
Betty: "Yeah."
Sandy: "Probably one of the worst."
Betty: "Yeah. It's worse than Christmas; and, plus, he flew in on a holiday when all the kids, where do they go?"
Sandy: "Right."
Betty: "They go to Florida."
Sandy: "Uh-huh."
Betty: "And schmucko flys into Los Angeles."
Sandy: "Yeah."
Betty: "You know, I mean—I mean, I would have flown in tomorrow or the day—you know?"
Sandy: "Jeff go up to pick him up?"
Betty: "Yeah."
Sandy: "I see."
Betty: "No. You see, where this airport is, Jeff left this morning at eleven."
[474] Sandy: "Uh-huh."
Betty: "To get to pick—to go up there to pick Ron up at two."
Sandy: "Yeah."
Betty: "Ron didn't get out to see Jeff until five."
Sandy: "Yeah."
Betty: "Then he had to go meet this guy for Rachel, to get to drive her 'cause, you see, we—oh, I get to tell you the rest, which maybe you don't—"
Sandy: "She coming into San Diego to pick up her car?"
Betty: "No. The idea is—wait till I tell you what Jeff did about the car."
Sandy: "Uh."
Betty: "This is a good one. He drove the car—"

Sandy: "She ruined your stereo."

Betty: "Oh, I know; but he took the thing over to whatchacallit. I can't even think where the hell it was. To Sears to pick up his car."

Sandy: "Yeah."

Betty: "Left it in Sears' parking lot. They towed my car away."

Sandy: (unintelligible)

Betty: "Yeah. So I don't know where the hell it is."

Sandy: "Oh, shit."

Betty: "So now I called—you know what they did? You're [475] going to die. They called the police department, and the emergency number. Are you ready for this?"

Sandy: "Uh-huh."

Betty: "Takes 19 times for it to ring. So, you know, I said to him, 'I just robbed a bank.'"

Sandy: "Yeah."

Betty: "And I said, 'You know, it took you 19 rings to answer the phone. I thought I would call and report it because I just robbed a bank.'"

Sandy: (laughs.)

Betty: "I said—no, I said, 'What if I really had an emergency? It took you 19 calls—I mean—you know, rings for you to answer.'"

Sandy: "Yeah."

Betty: "I said, 'Great. I could have been dead by now.'"

Sandy: "I'm sure."

Betty: "And the guy goes, 'Well, we're doing—we're not part of the El Cajon security, towing, or whatever.' What do you do with something like that? What if you go out to your car and it's gone?"

Sandy: "Parkway Plaza Sears?"

Betty: "Yeah."

Sandy: "So did you find it?"

Betty: "No. I had to call Sears, though (laughs)."

Sandy: "Oh, you had to call Sears?"

[476] Betty: "Oh, God. I mean, you know, I'm going to write a book. It could only happen to me. Anyway, that's what was said, though, with Sam. I mean, you know, he

said, 'Oh, I feel like crossing my heart and hoping to die.' Well, we left at around 10:30, quarter to 11:00."

Sandy: "Yeah."

Betty: "And, you know, that mother still has not even called to thank me to see if her kid's okay. I mean, I can't believe it."

Sandy: (laughs.)

Betty: "You know, I just—I just feel different about things; but, anyway—"

Sandy: "Yeah, I know. I know what you mean."

Betty: "You know, I wouldn't think of it."

Sandy: "Yeah."

Betty: "I mean, with you guys, it's a different matter; but, you know what I mean. it's that you still—you still call. I mean, my God, look at Reggie. Reggie can't go half a block (laughs)."

Sandy: "Really."

Betty: "But, you know—anyway, that was the only thing wonderful. I guess he just wants to count his money. He has—he has nothing else to do, you know, poor thing."

Sandy: (laughs.)

Betty: "No. But I'm like—huh. Well, around eleven."

[477] Sandy: "Yeah."

Betty: "But it's like I said. I said—because, well, he called. Right now they're in Long Beach."

Sandy: "Yeah."

Betty: "And, you know, that's just the start of it. You know?"

Sandy: "Yeah."

Betty: "I mean, how it's—because, like we went to Julian at—let's see. We left here at 10:35 and I don't think we got there till almost 11:30., and it was just like—not really bumper to bumper, but all the winnebagos and the campers and the—"

Sandy: "Yeah."

Betty: "You know what I mean?"

Sandy: "Oh, yeah."

Betty: "'Cause, remember, too, kids have been out of school and a lot of companies give Easter vacations off."

Sandy: "Yeah."

Betty: "You know. So that's another wonderful little holiday."

Sandy: "Yeah. (unintelligible)."

Betty: "Oh, yeah. It's terrible."

Sandy: "Yeah."

Betty: "Well, I know. Like I said, I had eight coming back from Alpine."

[478] Sandy: "Yeah."

Betty: "That—you know."

Sandy: "Yes."

Betty: "So I know exactly—"

Sandy: "He wants the coupons tonight, huh?"

Betty: "Yeah. Only because—the only reason he wants them is only because—"

Sandy: "Does he know I have them?"

Betty: "Huh?"

Sandy: "Does he know I have them?"

Betty: "No. He knows that Sam told you."

Sandy: (laughs.)

Betty: "See, he don't believe, see. I don't either."

Sandy: "I know."

Betty: "You know? And I mean, it's a terrible thing to say, and I know you've—it's putting you out."

Sandy: "Well, the thing of it is—"

Betty: "Oh, he got real indignant last night. Oh, he just got almost belligerent, and then he said, 'Well, Betty, you should have some say,' and all of a sudden I've got an I.Q. you know, and I said, 'This ain't my business, you know. Ain't my movie.'"

Sandy: "I'll go get it."

Betty: "Okay, Sandy."

(TAPE CONCLUDED.)

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EXCERPT OF TRIAL, JUNE 24, 1983

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[598] [AUSA Gorder] Now, at 4:19 P.M., was there another phone call that was intercepted?

[Agent Bobbitt] Yes, there was.

Q And was that an incoming or outgoing call?

A It was an outgoing call.

Q And what number was dialed?

A Two-three-three, four-five-six-seven.

Q And who were the speakers on that particular call.

A Betty Powell will be speaker number one. Jeff Powell will be speaker number two, and later in the conversation, Ron Powell will be speaker number three.

Q Okay; and this was at 4:19 P.M.?

A That is correct.

Q Which was nine minutes after the phone call we just listened to?

A That is correct.

Q And Agent Bobbitt, does count 5 in the indictment specifically refer to a call at 4:19 P.M. on this date?

A Yes, it does.

Mr. Gorder: Your Honor, we would like to play that one. [599] It's 107.

The Court: All right. You may play it.

(TAPE, GOVERNMENT'S EXHIBIT 107, COMMENCED.)

Betty: "(unintelligible) Home Gardens."

Jeff: "This is a prank."

Betty: "This is a prank?"

Jeff: "Uh-huh."

Betty: "Okay. What can I do for you, prank?"

Jeff: "You have to come home right away after work because nobody's going to be here."

Betty: "Why? Where's daddy?"

Jeff: "We're going to the baseball game."

Betty: "I thought we were going to go look at the house."

Jeff: "We are, first."

Betty: "And I thought I was going."

Jeff: "Well, it's—it's earlier. We're going now."

Betty: "Oh, all right. I will."
Jeff: "And he'll take you to see it later. Here's dad."
Ron: "Hello."
Betty: "Yeah, honey?"
Ron: "I'm going to look at that house right now."
Betty: "Okay."
Ron: "But I got a lot of driving to do. I got to go meet Don, first—"
Betty: "Okay.
[600] Ron: "—Then go there. I looked at a couple others today, which I didn't like, except for one, which I'm leaving you a sheet on the bed."
Betty: "Okay."
Ron: "There's one that's awesome. I left a sheet; but I think, probably, I like the one we—I took you to see this morning, but you didn't seem that impressed."
Betty: "No."
Ron: "Why?"
Betty: "'Cause the rooms are too chopped up, and it's—I don't like it."
Ron: "You didn't, did you?"
Betty: "Huh-uh."
Ron: "I loved it. All right, anyway—"
Betty: "I'd like it if the rooms could be bigger. You'd have to knock out a wall, and you'd have to build on another room."
Ron: "See, and I knew you didn't like it too much, and I loved it. Anyhow, that's the way it goes. I saw one today that I think you'll like. I left—I'm leaving a sheet on the bed. I'm also leaving a package for Sam on the bed."
Betty: "Okay."
Ron: "And a note about it. He's going to come right after you get here, so you got to hurry home."
Betty: "Okay. I will."
[601] Ron: "And this one you're going to like. It's 50 years old."
Betty: "Oh, where is it?"
Ron: "It's pretty far away. It's 20 miles."
Betty: "I don't care."

Ron: "It has—it has a horse barn bigger than the one we had in Glenco."
Betty: "Oh."
Ron: "Twenty-two stalls."
Betty: "Oh."
Ron: "But, wait a minute, it has a guest house with—with two bedrooms and two baths."
Betty: "Oh, but what did the house look like?"
Ron: "There's a picture of it here."
Betty: (unintelligible)
Ron: "Looks like a mansion."
Betty: "Oh, well, Ronnie, you've already sold me over the phone."
Ron: "Wait, you know how much—how much land there is?"
Betty: "Huh-uh."
Ron: "Are you ready for this?"
Betty: "Three hundred and fifty acres."
Ron: "Three thirty-one."
Betty: "See, I knew you were (unintelligible)."
Ron: "Wait a minute. This is not—this is not a farm. [601] It's a park."
Betty: "A park?"
Ron: "It's a park. It looks—it looks like Forest Park. It's three hundred and—"
Betty: "How many acres, Ronnie?"
Ron: "Three thirty-one."
Betty: "Three thirty-one."
Ron: "It's a million and a half coupons."
Betty: "Could—could I maybe have some of the room in there with me?"
Ron: "It's a million and a half coupons."
Betty: "Oh, Ronnie."
Ron: "Wait a minute, here's—"
Betty: "Where is it? Wow."
Ron: "It's in Jamul."
Betty: "Say where?"
Ron: "Jamul. Wait a minute."
Betty: "Jamul?"
Ron: "The house has four bedrooms, has nine rooms."

Betty: "Oh, hold on just a minute, honey."
Ron: "Wait—wait a minute. I haven't much time."
Betty: "Well, I got to answer the phone."
Ron: "Okay."
(Pause.)
Betty: "Okay."
[603] Ron: "All right. Here, it has nine rooms. Four bedrooms."
Betty: "Uh-huh."
Ron: "Dining room, breakfast room, gas furnace, three bathrooms, shower, fireplace."
Betty: "Have you seen it?"
Ron: "Yeah. Tile roof, cement foundation."
Betty: "Does it have wood?"
Ron: "Huh?"
Betty: "Does it have wood?"
Ron: "Yeah."
Betty: "Oh, God."
Ron: "It's ten miles to the nearest town."
Betty: "Well, where is that?"
Ron: "It's ten miles. It's in no town. It's in the country. Wait a minute. Has a horse barn that is bigger—"
Betty: (unintelligible)
Ron: "It has a horse barn that has four more stalls than our barn in Glenco, than our big one."
Betty: "Yeah."
Ron: "It has a guest house with two bedrooms and one bath. It has a maid's quarters."
Betty: "Huh."
Ron: "Wait a minute. It's—it's a beautiful Spanish [604] home, private maid's quarters, foreman's home, ideal for private estate horse or cattle ranch."
Betty: (unintelligible)
Ron: "A lot of the acres are in hay."
Betty: "Well, that's good. You can sell that."
Ron: "It has a guard dog on duty."
Betty: "God."
Ron: "Just the taxes are six hundred a month."
Betty: "Okay."
Ron: "That's for the taxes."

Betty: "Yeah."
Ron: "The payments are eleven thousand a month."
Betty: "Oh, Ronnie, that's ridiculous."
Ron: "Hey, I could make them, though."
Betty: "I know. I'll talk to you."
Ron: "Three hundred, and the price is one million—"
Betty: "I want a victorian house."
Ron: "—Five hundred. It's a Spanish house."
Betty: "Okay. Would you like to go see the modern house they're having a preview of?"
Ron: "No, no. I'm going to buy one of the ones I've seen."
Betty: "No, no. I don't mean that. You don't buy this one. They—"
Ron: "I got to go honey. I'm late."
[605] Betty: "All right. Goodbye."
Ron: "Hurry home, though. 'Bye."
Betty: "'Bye."

(TAPE CONCLUDED.)

By Mr. Gorder:

Q And approximately what time did that call end?
A Approximately 4:23.
Q Now, as we just heard that, before the phone call was completed, there was somebody talking in the background. Did you identify that as Jeff Powell?
A Yes. That is correct.
Q But once the phone was answered, Betty Powell was the first speaker?
A That is correct.

* * *

[628] [AUSA Gorder] Okay. Now, directing your attention to the morning of April 20, was there a call that was intercepted at 7:15 that morning?
[Agent Bobbitt] Yes, there was.
Q And was that an incoming or outgoing call?
A It was an outgoing call.
Q To what number?
A It was placed to an 800 telephone number, 252-9001.
Q And who were the participants in that phone conversation?

A An unknown female employee of T.W.A. reservations was speaker number one, and Betty Powell was speaker number two.

Q And are you aware that count six of the indictment specifically refers to a call at that time and date?

[629] A Yes, I am.

Mr. Gorder: Okay. Your Honor, we would like to play that one, and it's identified as 111.

The Court: All right. You may play it.

(TAPE, GOVERNMENT'S EXHIBIT 111, COMMENCED.)

Recorded Message: "Thank you for calling T.W.A. We apologize for the delay, but please stay on the line. Your call will be answered shortly.

T.W.A.'s guaranteed air fare applies to call our domestic flights, with the exception of a few promotional sales. For details, ask the consultant; and thanks again for calling T.W.A."

(Pause.)

Female: "T.W.A. reservations. Good afternoon."

Betty: "Yes, (unintelligible). My husband had a flight out this morning and he missed it, on T.W.A., San Diego to St. Louis, I think it—it was at—I'm not sure of the time now. I didn't bring the ticket up."

Female: (unintelligible)

Betty: "Okay."

Female: "Four-eight-two; and the last name?"

Betty: "Nixon; and he'd like to reschedule it for tomorrow morning."

Female: "He was supposed to leave at 7:55—"

Betty: "Uh-huh.

[630] Female: "—For today, the twentieth of April? I'm not showing a Nixon. Dixon or Nixon?"

Betty: "Dixon."

Female: "Oh, Dixon. It's still not showing it. Sure it was on T.W.A.?"

Betty: "At 7:55, a Charles Dixon."

Female: "I've tried Nixon. I—"

Betty: "Okay. Well—well, let me go get the ticket. Maybe they misspelled it. Hold on."

Female: "Do what?"

Betty: "I beg your pardon?"

Female: "No. I'm just talking to somebody."

Betty: "Oh."

(Pause.)

Betty: "Yeah, it's Chuck Dixon. It's flight 482, 7:55. You want the ticket number?"

Female: "Okay. Here, I found it."

Betty: "So can you reschedule him for tomorrow?"

Female: "Yes."

Betty: "Okay."

Female: "(unintelligible) Local phone number (unintelligible)."

Betty: "Nine—wait a minute. I have to think of where we're going to be; 440-6792."

Female: "Thank you."

[631] Betty: "Uh-huh. 'Bye."

(TAPE CONCLUDED.)

By Mr. Gorder:

Q Now, what time did that call end?

A Approximately 7:19 A.M.

Q And this number that Mrs. Powell gave, 440-6792, that's not the number of the Powell house?

A It's not the residence telephone number. That is correct.

Q Okay; and I think, on that conversation, at the very beginning, there was a recorded message, and the second speaker, so to say, was the T.W.A. reservation clerk?

A That is correct.

Q The third was Betty Powell?

A Correct.

* * *

EXCERPT OF TRIAL, JUNE 30, 1982

[1287] [The Court] A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

* * *

EXCERPT OF TRIAL, JULY 1, 1982

* * *

[1314] [The Court] This next one or two instructions, ladies and gentlemen, deal with counts three through six. Section 843(b) of Title 21, Subchapter One, United States Code, provides in pertinent part as follows: It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or causing or facilitating the commission of any act or acts constituting a felony under the provisions of this Chapter or Subchapter Two of this chapter. Each separate use of the communication facility shall be a separate offense under each section.

A telephone is included within the meaning of a communication facility. The elements of the offense charged in counts three through six of the indictment are as follows: First, that the defendant used a telephone at the time charged to commit, cause, or facilitate the commission of conspiracy to possess cocaine with intent to distribute or possession of cocaine with intent to distribute; secondly, that she did so knowingly or intentionally.

* * *

[1375] The Court: Good afternoon, ladies and gentlemen. I have received two notes from the jury. I have discussed the matter briefly with counsel.

The court would note the presence of all members of the jury.

We have made arrangements to play the tapes that you have requested. That can be done at this time; however, I just received a note which reads as follows: "Judge, we're still at an impasse as to the facts of what was in the package. Most of the jurors are sure that the defendant knew there was either quaaludes or cocaine in the package. Since there is no [1376] evidence that the defendant knew whether it was cocaine or quaaludes, we must give her a not guilty because the count specifies only cocaine. Is that a correct assumption?"

I have discussed the note briefly with counsel, and I would answer your inquiry in this fashion, ladies and gentlemen: The specific question, really, concerns itself with

which counts to which you have reference. After discussion with counsel, if your inquiry concerns counts one or two or counts nine and ten, the government, of course, must prove that a specific controlled substance—to wit, either quaaludes or cocaine—was involved, one or the other. In other words, they have to show that specific controlled substance in order to sustain their burden of proof as I have otherwise instructed.

As to the so-called telephone counts, however, there is a different answer, and that would be as follows: If you find that the so-called package contained either cocaine or quaaludes, if you find that it was a, quote, "controlled substance," no matter which controlled substance it was, their proof would be sufficient if, in fact, the evidence shows that it was a controlled substance; to wit: either quaaludes or cocaine.

Now, that's the shortform answer in a very complicated area of the law, but basically, to repeat—and I hope to explain, rather than to further delineate an explanation—the telephone counts, if the defendant has reason [1377] to believe it was a controlled substance, even if she didn't know specifically which one it was, they have met their burden of proof if it's complete in all other aspects of the instructions as to the elements that I have told you.

On the other hand, as to the specific subtance counts, nine and ten, and the conspiracy to possess, with intent to distribute, cocaine as charged in count one, quaaludes as charged in count two, the government must, in the course of their proof, show that the controlled subtance involved was that which they alleged it to be, cocaine or quaaludes.

I trust that answers your question.

Mr. Turner, do you desire to have the tapes played now?

Jury Foreperson: I think we still want to hear them.

The Court: If you would then, in re.ponse to the first question, counsel, is there any quarrel with what I have just said, Mr. Gorder?

Mr. Gorder: No, your honor.

The court: Mr. Prantil?

Mr. Prantil: None other than what I have just stated.

• • •

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 82-0873-E-Criminal

UNITED STATES OF AMERICA

v.

BETTY LOU POWELL (1)

On this 26th day of July, 1982 came the attorney for the government and the defendant appeared in person and by counsel Frank Prantil,

IT IS ADJUDGED that the defendant upon her plea of not guilty and a verdict of guilty, has been convicted of the offense of unlawful use of a communication facility, in violation of 21 USC 843(b), as charged in each of counts 3, 4 and 5, and of false statements, in violation of 18 USC 1001, as charged in count 15 of the Superseding Indictment in 15 counts, and the Court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on each of counts 3, 4, 5 and 15 concurrently the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on each of counts 3, 4, 5 and 15 concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years and pursuant to 18 USC 4205(b)(2) the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the United States Parole Commission.

IT IS ORDERED on motion of the U.S. Attorney that the Underlying Indictment filed in this case is hereby dismissed.

IT IS ORDERED that the Clerk delivered a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve the commitment of the defendant.

/s/ William B. Enright
WILLIAM B. ENRIGHT
United States District Judge.
Filed: July 28, 1982
WILLIAM W. LUDDY, Clerk
J. Hatch
J. HATCH, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 82-0373-01-E-Criminal

UNITED STATES, APPELLEE-PLAINTIFF

v.

BETTY LOU POWELL, APPELLANT-DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that Betty Lou Powell defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this proceeding on the 28th day of July, 1982.
Transcripts Required: Yes
Date Complaint or Indictment/Information Filed: 4-26-82

/s/ Frank Prantil
FRANK G. PRANTIL,
Attorney for Defendant

NOTICE OF APPEAL MAY BE SIGNED BY:
(1) the defendant, or (2) defendant's attorney, or (3) the Clerk on request from defendant.

Supreme Court of the United States

No. 83-1307

UNITED STATES, PETITIONER,

v.

BETTY LOU POWELL

ORDER ALLOWING CERTIORARI. Filed *May 21, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

PETITIONER'S

BRIEF

Office - Supreme Court, U.S.
FILED
JUL 5 1984
CLERK

No. 83-1307

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the "inconsistent verdict" rule of *Dunn* v. *United States*, 284 U.S. 390 (1932), a conviction based upon a jury verdict finding a defendant guilty of using a telephone to facilitate a controlled substance offense may be set aside on the ground that it is inconsistent with the defendant's acquittal of the offense alleged to have been facilitated.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1307

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 708 F.2d 455. The order of the court of appeals denying the government's petition for rehearing (Pet. App. 6a-8a) is reported at 719 F.2d 1480.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1983. The government's petition for rehearing was denied on November 10, 1983 (Pet. App. 6a-8a). On January 3, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 8, 1984. The petition was filed on February 7, 1984, and was

granted on May 21, 1984 (J.A. 30). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[1]

STATUTORY PROVISION INVOLVED

21 U.S.C. 843(b) provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent was convicted on three counts (Counts 3-5) of using a telephone to facilitate a conspiracy to possess cocaine with intent to distribute it or the substantive offense of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 843(b), and on one count (Count 15) of making a false statement to a United States magistrate in connection with her request for the appointment of counsel, in

[1] Respondent's petition for rehearing on her false statement conviction was denied by the court of appeals on February 29, 1984, and this Court denied her petition for a writ of certiorari on June 18, 1984 (No. 83-6617).

violation of 18 U.S.C. 1001. Respondent was acquitted by the jury on one count (Count 1) of conspiracy to possess cocaine with intent to distribute it (21 U.S.C. 846).[2] She was sentenced to concurrent terms of four years' imprisonment on each of the convictions. The court of appeals reversed the convictions on the three counts of telephone facilitation and affirmed the conviction of false statement; it remanded to permit the district court to resentence respondent in light of the reversal of the telephone facilitation convictions. Pet. App. 1a-5a.

1. The evidence at trial consisted largely of recordings of telephone conversations that were intercepted pursuant to court-authorized electronic surveillance in April 1982. With respect to the telephone facilitation counts,[3] the evidence showed that respondent's husband, Ron Powell, and their son, Jeff, operated an

[2] Respondent was also acquitted on one count (Count 2) of conspiracy to possess quaaludes with intent to distribute them (21 U.S.C. 846); one count (Count 6) of telephone facilitation of a controlled substance offense (21 U.S.C. 843(b)); two counts (Counts 7-8) of assault with a deadly weapon upon federal officers (18 U.S.C. 111 and 1114); one count (Count 9) of possession of approximately two kilograms of cocaine with intent to distribute it (21 U.S.C. 841(a)(1)); one count (Count 10) of possession of approximately 2200 dosage units of quaaludes with intent to distribute them (21 U.S.C. 841(a)(1)); and four counts (Counts 11-14) of possession of a machine gun and silencers that were not registered and did not have serial numbers (26 U.S.C. 5861(d) and (i)).

[3] The facts pertaining to the false statement conviction are summarized in the opinion of the court of appeals (Pet. App. 3a-4a) and in our Brief in Opposition (at 2-3) to respondent's Petition for a Writ of Certiorari (cert. denied, No. 83-6617 (June 18, 1984)); that conviction does not relate to the question presented in our petition for certiorari and addressed herein.

extensive network to distribute cocaine and quaaludes in their home city of San Diego and in Los Angeles and St. Louis (Tr. 633-634, 654). The residence where respondent and her husband lived served as the headquarters for the distribution network and was used to store controlled substances, drug paraphernalia, and records related to the drug operation (Tr. 152-156, 176-200).

Ron Powell was the central figure in the operation and took in a gross amount of approximately $15,000 per week (Tr. 930-931). Although respondent played a subordinate role in the organization, "she knew what was going on," as the defense conceded to the jury (Tr. 1265),[4] and both assisted and benefited from the drug activities.[5]

In March 1982, Ron Powell went to Europe and left Jeff in charge of the drug business. While Ron

[4] Respondent acknowledged that she knew her husband was selling cocaine (Tr. 1002-1003, 1043, 1046).

[5] For example, Ron Powell, with respondent's knowledge, placed a bid on a $1.5 million ranch for them to live on and planned to use proceeds of the drug business to pay the monthly mortgage and taxes of nearly $12,000 (Tr. 502-504, 615-626, 637-639). As the district court summarized at the time of respondent's sentencing (7/26/82 Sentencing Tr. 16):

> [T]hough her role was lesser [than her husband's], she benefitted substantially. • • • [T]he home they were buying was a • • • million and a half.
>
> • • • • •
>
> [S]he knew where Mr. Powell made his money. No question about that.
>
> • • • • •
>
> They were talking about buying the magnificent residence with many, many acres; and she had to know that the benefits she was talking about came directly from the drug traffic.

was away, respondent was involved in several telephone calls related to drug transactions (Tr. 329-342).

On April 9, 1982, Ron Powell telephoned that he would be returning home in two days (Tr. 430-432, 437-438). During the conversation he asked Jeff about collections that were due for various drug deals. In an effort to make the collections before his father arrived, Jeff began to call drug customers, including Sam Spindle (Tr. 439-440). The next day, Spindle came by respondent's residence to buy drugs, but Jeff was not at home; Spindle talked to respondent, who located Jeff by telephone and reminded him about Spindle (Tr. 442).

On April 11, Jeff picked up his father at the Los Angeles airport. That evening Jeff called respondent at home (Tr. 466-470; J.A. 9-11). Respondent told him that Sam Spindle, who still owed money for drug purchases (Tr. 447, 453), had not called, but Jeff said that Spindle had contacted him (Tr. 469; J.A. 10). Jeff asked respondent "to do [him] a favor" and "call the Thin Man" (*ibid.*); the "Thin Man" was the nickname of Sandy Segal, who had agreed to obtain the money from Spindle for Jeff (Tr. 941-943). After respondent said that she would make the call, the following conversation occurred (Tr. 469-470; J.A. 10-11):

> Jeff: Okay. Which his phone number—
> [Respondent]: Yeah, I know.
> Jeff: And ask him if he has the coupons [6] and if he does, ask him if—if he would bring them over.
> [Respondent]: If he can bring them.

[6] "Coupons" was a coded reference to money (Tr. 786, 934).

Jeff: (Unintelligible) coupons to him.
[Respondent]: Oh, okay.
Jeff: All right?
[Respondent]: If he can bring them over to me.
Jeff: Yeah.
[Respondent]: Okay.
Jeff: All right.
[Respondent]: All right.

That telephone call formed the basis for Count 3 of the indictment.

Approximately three minutes after completing the telephone conversation with Jeff, respondent placed a call to Sandy Segal (Tr. 470-478; J.A. 11-16):

Sandy: Hello.
[Respondent]: Hi. It's me.
Sandy: Hi.
[Respondent]: Listen, did Samuel come by and visit you?
Sandy: Yeah. Well, yes and no. I was supposed to go pick it up and I haven't—can I take care of that in the morning?
[Respondent]: Well, that's what Ron—they called and he wants all the money home tonight because that was the arrangement Sam made.

• • • • •

[Respondent]: [Last night Sam said that he would] "be over [today] before ten o'clock," and I said, "Listen, Sam, I'm sick of messing around with your crap and doing things around you."
Sandy: Yeah.
[Respondent]: I said, "From now on, people want to do something, they'll do it around me."
Sandy: Yeah.
[Respondent]: And I mean it. I'm sick of it, Sandy.

• • • • •

Sandy: [Ron] wants the coupons tonight, huh?
[Respondent]: Yeah. Only because—the only reason he wants them is only because—
Sandy: Does he know I have them?
[Respondent]: Huh?
Sandy: Does he know I have them?
[Respondent]: No. He knows that Sam told you.
Sandy: (Laughs.)
[Respondent]: See, he don't believe me, see. I don't either.

Tr. 471-472, 478; J.A. 11-12, 16.[7] Respondent's telephone call to Segal formed the basis for Count 4 of the indictment.

Following his return from Europe, Ron Powell made arrangements for a new shipment of cocaine to be brought to San Diego. Among the people involved were Sandra Thomas and someone named "Nolan" (Tr. 534-548, 1164-1167). Respondent assisted in this project by answering the telephone, taking messages, and returning calls (Tr. 549, 1164-1165).[8]

On April 16, Sam Spindle called Ron Powell several times to arrange to purchase "jackets"—that is, one-eighth of an ounce (Tr. 277-278, 440, 581, 936)—of the new cocaine (Tr. 576-597). Powell indicated that he would leave the cocaine with respondent for Spin-

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[7] The next day Ron Powell called Sandy Segal, who told Powell that he had "that money" (Tr. 488) and would meet Powell "with those coupe" (Tr. 489).

[8] At trial, respondent denied knowing anyone named Sandra Thomas (Tr. 1040, 1052). However, respondent had spoken with Thomas on the telephone (Tr. 1164-1165), and Thomas's name and address were entered in respondent's address book (Tr. 1040-1041).

dle to pick up (Tr. 581). Spindle eventually decided to buy a "cuter," or one-quarter ounce (Tr. 345, 362, 804, 935), of cocaine (Tr. 597). Powell then called respondent at her office (Tr. 598-605; J.A. 17-21). He said that he was "leaving a package for Sam on the bed," and he told her "to hurry home" because "[Sam's] going to come right after you get [t]here" (Tr. 600; J.A. 18). Respondent agreed to do so.* This telephone conversation formed the basis for Count 5 of the indictment.

On April 23, Ron Powell learned of the existence of the wiretap (Tr. 679-680, 687-691, 1173). Powell called Jeff and told him to "clean up" (Tr. 691, 895). Jeff then told respondent to leave the house and drive to Los Angeles (Tr. 896, 1066). She was followed by FBI agents, who realized that Powell was aware of the wiretap and were concerned that evidence would be removed from the Powells' residence (Tr. 29, 33, 37, 45-47, 58, 66, 692). Respondent was driving at a high rate of speed and did not stop when FBI vehicles pulled alongside her car and the agents identified themselves (Tr. 46-47, 71, 92). Instead, she made an illegal U-turn and sped away after forcing another car off the road (Tr. 72, 73). The FBI agents eventually caught up with respondent, and they again identified themselves and advised respondent that she was under arrest (Tr. 74). Respondent refused to surrender and eluded apprehension by running her car into one agent and an FBI vehicle and narrowly missing a second agent (Tr. 75, 95-96). Shortly thereafter, respondent was stopped and arrested (Tr. 77-78). Her car was impounded and,

* Records seized from respondent's car after her arrest indicated that Ron Powell had sold a quarter ounce of cocaine to Spindle on April 16 (Tr. 204, 904).

in a later search conducted pursuant to a warrant, was found to contain approximately two kilograms of cocaine, 2700 quaalude tablets, marijuana, a semi-automatic pistol with exploding bullets, two illegal silencers, a machine gun, various other firearms and drug paraphernalia, and more than $30,000 in cash (Tr. 129-150, 202-221, 779). In addition, passports for Ron and Jeff Powell were found in respondent's purse (Tr. 706-707).

2. In its instructions on the telephone facilitation counts, the district court read the relevant portion of 21 U.S.C. 843(b) to the jury (Tr. 1314; J.A. 25). It then summarized the elements of the charges against respondent (*ibid.*):

> The elements of the offense charged in counts three through six of the indictment are as follows: first, that [respondent] used a telephone at the time charged to commit, cause, or facilitate the commission of conspiracy to possess cocaine with intent to distribute or possession of cocaine with intent to distribute; secondly, that she did so knowingly or intentionally.

In addition, the court in its general instructions advised the jury that "[a] separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged" (Tr. 1297; J.A. 24). The jury convicted respondent on three counts of using a telephone to facilitate a controlled substance offense and on one count of making a false statement; it acquitted respondent on the remaining counts.

3. On respondent's appeal, the Ninth Circuit reversed respondent's three convictions for telephone facilitation and affirmed her false statement conviction (Pet. App. 1a-5a). The reversal of the Section 843(b) counts rested on the court of appeals' conclusion that the jury's guilty verdict was inconsistent with the acquittal on the conspiracy offense in Count 1. In reaching that result, the court of appeals rejected the government's contention that these verdicts were not inconsistent and could be reconciled on the theory that respondent had used the telephone to facilitate the possession of cocaine by someone not involved in the conspiracy alleged in Count 1 (Pet. App. 2a). Having found that the verdicts were inconsistent, the court simply concluded, without elaboration, that "[t]hus, on the facts of this case, we must reverse the convictions as to [the three Section 843(b) counts]" (*ibid.*). The court did not address the government's argument that the guilty verdicts were not invalid in light of the "inconsistent verdict" rule of *Dunn* v. *United States*, 284 U.S. 390 (1932).

The panel denied the government's petition for rehearing and issued an order explaining its earlier opinion (Pet. App. 6a-8a). The court referred to the rule of *Dunn* v. *United States*, *supra*, that "inconsistent verdicts do not require reversal, but may be viewed as a demonstration of the jury's leniency" (Pet. App. 6a), and it acknowledged that "[t]his circuit follows the *Dunn* rule" (*ibid.*). Emphasizing that even under *Dunn* "there must nevertheless be sufficient evidence to sustain the guilty verdict" (*ibid.*), the court stated, without further explanation, that "[o]ne of the exceptions to the application of the *Dunn* rule, is the situation where the defendant

is charged with violation of 21 U.S.C. § 843(b) and the underlying felony, said to have been facilitated, is reversed." *Id.* at 6a-7a (footnote omitted). Adhering to its view that the verdicts were in fact inconsistent here (*id.* at 7a-8a), the court held that "[w]hen the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts, convictions of the latter must be reversed for lack of sufficient evidence" (*id.* at 7a)."

Based on the reversal of the Section 843(b) counts, the court of appeals remanded the case "to the district court to permit resentencing on [the false statement count]" (Pet. App. 5a). The court found that "[t]he possibility is * * * strong that had [respondent] been sentenced only on [the false statement count] she might have received a less severe sentence" (*id.* at 4a-5a). For this reason the court declined to "apply the concurrent sentence doctrine and not inquire into the asserted error as to [the telephone facilitation counts]" (*ibid.*)."

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[10] We have not sought review in this Court of the fact-bound determination of the court of appeals that the jury's verdicts were inconsistent. The issue presented here is whether such inconsistency invalidates, as a matter of law, respondent's convictions on the counts on which the jury found her guilty. See *Dunn* v. *United States*, 284 U.S. 390, 392-393 (1932); *Harris* v. *Rivera*, 454 U.S. 339, 344, 348 (1981).

[11] As we pointed out in our Petition (at 9 n.10), the concurrent sentence doctrine does not counsel against this Court's resolution of the inconsistent verdict issue decided by the court of appeals. The court of appeals remanded the case to the district court to permit resentencing on the false statement count in light of the reversal of the telephone facilitation convictions, and thus the disposition of the latter counts may affect respondent's ultimate sentence. Moreover, because 21

SUMMARY OF ARGUMENT

In *Dunn* v. *United States*, 284 U.S. 390 (1932), this Court held that a conviction is not to be reversed because of an inconsistency in the jury's verdict. Although an acquittal on some counts and a conviction on others may in fact be inconsistent, " 'that does not show that [the jury was] not convinced of the defendant's guilt.' " 284 U.S. at 393 (citation omitted). Rather, such a verdict can reflect the jury's exercise of " 'lenity' " (*ibid.*). *Dunn* establishes that "[c]onsistency in the verdict is not necessary. * * * * * [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]" (284 U.S. at 393, 394).

For more than 50 years the Court has adhered to the *Dunn* rule without exception. These decisions make clear, as the Court recently reaffirmed, that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside. * * * [The *Dunn* rule recognizes] the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris* v. *Rivera*, 454 U.S. 339, 345, 346 (1981). Where, as here, "a guilty verdict * * * is supported by sufficient evidence and is the product of a fair trial" (*Harris* v. *Rivera*, 454 U.S. at 344), it is a valid expression of the jury's determination and should not be set aside on grounds of inconsistency.

The court of appeals sought to create an exception to the *Dunn* rule for the telephone facilitation offense in 21 U.S.C. 843(b), which includes as an essential element the existence of an underlying offense that

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U.S.C. 843(c) provides enhanced penalties for second or subsequent offenses, respondent's convictions on the telephone facilitation counts have significant collateral consequences.

was facilitated by the use of the telephone. In the court's view, the acquittal on the offense alleged to have been facilitated rendered invalid the convictions on the telephone facilitation counts.

The *Dunn* rule is not subject to an exception for such compound-predicate offenses. *Dunn* reflects the jury's unreviewable power to acquit for reasons of lenity even though it was convinced of the defendant's guilt. That rationale is just as applicable in a case involving compound-predicate offenses as in any other. Furthermore, the court of appeals' exception is inconsistent with the holding in *Dunn* itself, which sustained a conviction on a compound-predicate nuisance count despite the jury's acquittal on the underlying offenses.

Nor does the discussion of res judicata in *Dunn*, which draws an analogy to inconsistent judgments at separate trials, support the court of appeals' exception to the *Dunn* rule. That discussion was of doubtful correctness even at the time and in any event has long since been repudiated by subsequent decisions of this Court. Nevertheless, the *Dunn* rule remains of unquestioned soundness based on the jury's power of lenity. Moreover, any exception derived from res judicata principles would threaten to swallow the *Dunn* rule and would indicate that *Dunn* itself was wrongly decided.

Thus, contrary to the decision below, the *Dunn* rule controls this case and precludes reversal of respondent's convictions under 21 U.S.C. 843(b) on the ground of inconsistency in the jury's verdict.

ARGUMENT

THE *DUNN* RULE PRECLUDES REVERSAL OF A CONVICITION ON THE GROUND OF INCONSISTENCY IN THE JURY'S VERDICT

A. The *Dunn* Rule Is Well Settled And Requires That A Conviction Be Upheld, Notwithstanding Any Inconsistency In The Jury Verdict, If It Is Supported By Sufficient Evidence

1. Few principles of criminal law are as well established as the rule of *Dunn* v. *United States*, 284 U.S. 390, 393, 394 (1932), that "[c]onsistency in the verdict is not necessary. • • • • • [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]." The Court has adhered to the *Dunn* rule for more than 50 years and has recently reaffirmed that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981). See also *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Borum* v. *United States*, 284 U.S. 596 (1932); *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184, 201 (1820); *cf. Standefer* v. *United States* 447 U.S. 10 (1980). These decisions "preclude a holding that inconsistency in a verdict is intolerable in itself." *Harris* v. *Rivera*, 454 U.S. at 346.

Dunn explained why an inconsistency in the verdict does not undermine the counts on which the defendant is convicted:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

284 U.S. at 393 (quoting *Steckler* v. *United States*, 7 F.2d 59, 60 (2d Cir. 1925) (L. Hand, J.)); see also *Harris*, 454 U.S. at 347. Thus, the *Dunn* rule reflects "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris*, 454 U.S. at 346 (footnote omitted). A jury "in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty' • • • even if the evidence of guilt is overwhelming" (*Jackson* v. *Virginia*, 443 U.S. 307, 317 n.10 (1979)), and it "has the power to bring in a verdict in the teeth of both law and facts." *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920). See also *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 24-25; *United States* v. *Maybury*, 274 F.2d 899, 902-903 (2d Cir. 1960) (Friendly, J.)." Such a verdict can result from jury

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" Jury nullification or leniency is, as *Dunn* observed (284 U.S. at 393 (citation omitted)), the " 'assumption of a power which [the jurors] ha[ve] no right to exercise.' " In the federal system juries are not instructed on their "raw power of nullification" (*Roberts* v. *Louisiana*, 428 U.S. 325, 347 (1976) (White, J., dissenting)). See, *e.g.*, *Sparf and Hansen* v. *United States*, 156 U.S. 51, 102 (1895); *United States* v. *Dougherty*, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972); *United States* v. *Moylan*, 417 F.2d 1002, 1005-1007 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970); *United States* v. *Battiste*, 24 F.Cas. 1042, 1043 (C.C.D.Mass. 1835) (No. 14,545) (Story, Circuit Justice); see also Tr. 1285. But see Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1016-1017 (1980).

"lenity,"[14] "mercy,"[15] or "compassion,"[16] as well as from "compromise"[17] or from "mistake,"[18] "carelessness,"[19] or "irrationality."[20]

The *Dunn* rule serves several important policies. First, it protects the integrity of the jury's verdict and ensures that an acquittal based on leniency or compromise will not invalidate the very conviction that the jury determined to be appropriate. As Judge Friendly explained in *United States* v. *Carbone*, 378 F.2d 420, 422 (2d Cir.), cert. denied, 389 U.S. 914 (1967):

> The very fact that the jury may have acquitted of one or more counts in a multi-count indictment because of a belief that the counts on which it • • • convicted will provide sufficient punishment • • • forbids allowing the acquittal to upset or even to affect the simultaneous conviction.[21]

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[14] *Dunn*, 284 U.S. at 393.

[15] *Jackson* v. *Virginia*, 443 U.S. at 317 n.10.

[16] *Standefer*, 447 U.S. at 22.

[17] *Dunn*, 284 U.S. at 394; *Dotterweich*, 320 U.S. at 279; *Standefer*, 447 U.S. at 22; see also *Stein* v. *New York*, 346 U.S. 156, 178 (1953), overruled on other grounds, *Jackson* v. *Denno*, 378 U.S. 368 (1964).

[18] *Dunn*, 284 U.S. at 394.

[19] *Dotterweich*, 320 U.S. at 279.

[20] *Dotterweich*, 320 U.S. at 279; see also *Hoag* v. *New Jersey*, 356 U.S. 464, 472 (1958), limited on other grounds, *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

[21] See also Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649, 651-652 (1950) ("*Dunn* reaffirms the jury's power to exercise leniency by limiting punishment to sentence upon only one of many counts"); Perkins, *Dealing With The Inconsistent Verdict*, 15 Crim. L. Bull. 405, 415 (1979):

> It must be emphasized that the jury's mercy-dispensing power is not exercised on an all-or-nothing basis. The jury may "pardon" a defendant to the extent of relieving him from some of the consequences of his wrongdoing without relieving him from others. This means it may release him from the consequences of his crime as represented in one count of the indictment while holding him accountable for the consequences of the very same act as represented in another count. • • • [I]f the jury decides upon a partial "pardon" and returns a verdict of guilty on one count and not guilty on another, it is certainly unwise to have a procedure which requires the judge to enter verdicts of acquittal on both counts if the verdict is found to be inconsistent.

Furthermore, by sustaining the conviction and obviating the need for a retrial, the *Dunn* rule both enhances the efficient administration of justice and advances "the important federal interest in the enforcement of the criminal law" (*Standefer*, 447 U.S. at 24). Finally, the *Dunn* rule preserves for the defendant the advantages of the jury's acquittal even though, as *Dunn* noted (284 U.S. at 393 (citation omitted)), there exists the possibility that " 'the jury did not speak their real conclusions' " in rendering that verdict and instead were " 'convinced of the defendant's guilt.' "[22] Hence, while consistency in the

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In addition, as Judge Friendly observed in *United States* v. *Carbone*, 378 F.2d at 422, "if the [inconsistent verdict] rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants."

verdict and "symmetry of results may be intellectually satisfying, [they are] not required" (*Standefer*, 447 U.S. at 25) and do not contravene the analysis and policies underlying the *Dunn* rule. Accordingly, if "a guilty verdict * * * is supported by sufficient evidence and is the product of a fair trial" (*Harris*, 454 U.S. at 344), it is a valid expression of the jury's determination and should not be reversed on grounds of inconsistency.

2. In reversing respondent's convictions on the Section 843(b) counts, the court of appeals did not assert that there was any defect or unfairness in the trial proceedings. Nor did it—apart from the issue of inconsistency—controvert the sufficiency of the evidence under traditional standards to support the guilty verdicts on those counts.

In fact, the evidence at trial (see pages 3-9, *supra*) clearly establishes respondent's guilt. See generally *Jackson* v. *Virginia*, 443 U.S. at 315-320, 324, 326.[a] Respondent engaged in repeated telephone conversations that furthered the drug enterprise, and she benefited substantially from its success. Moreover, respondent "knew," as the defense conceded to the jury, "what was going on" (see page 4, *supra*), and she was knowledgeable about the drug operations. For example, as shown in the telephone calls of April 11 (see pages 5-7, *supra*), respondent

[a] The district court, which heard the "long" and "extensive" tapes of respondent's recorded telephone conversations, specifically noted that "[t]here is no question in my mind that the jury correctly anal[y]zed [respondent's] involvement in the telephone counts. * * * * * [Respondent's husband] conducted his business over that telephone. [Respondent] knew what that business was because she was convicted of counts using the phone in the same manner" (7/26/82 Sentencing Tr. 16).

was aware of the identity of the person referred to as "the Thin Man" and had his phone number." In addition, she was familiar with the term "coupons," which was a coded reference to money. In these circumstances, where respondent's "trial was fairly conducted * * * [and] the record contains adequate evidence of [her] guilt * * * beyond a reasonable doubt" (*Harris*, 454 U.S. at 348 (footnote omitted)), *Dunn* precludes reversal of her convictions under Section 843(b) on inconsistent verdict grounds.

To be sure, in setting aside respondent's convictions on the ground of inconsistency in the verdict, the court of appeals stated that "[w]hen the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts, convictions of the latter must be reversed for lack of sufficient evidence" (Pet. App. 7a). Accordingly, the court held "that there is insufficient evidence to support the convictions on [the telephone facilitation counts]" (*id.* at 8a).

In so holding, the court of appeals confused the concepts of sufficiency of the evidence and consistency of the verdict. As just discussed, there is no doubt that the evidence of respondent's guilt on the telephone facilitation counts was adequate under traditional standards. Of course, the telephone counts

[a] In this connection the district judge observed (7/26/82 Sentencing Tr. 16-17):

> I am satisfied [respondent] lied to the jury. She said she didn't know a Thin Man, never heard of him, she said, until she was here in court. Then they played the tape, and she was told to call the Thin Man, and she did. I have questions about her credibility before this Court * * *.

required proof of the offense alleged to have been facilitated." But—apart from the fact that the jury returned an inconsistent verdict—the government did prove the existence of the facilitated offense, as the jury must have found in convicting respondent on the telephone facilitation counts. *Cf. Standefer*, 447 U.S. at 20-21 n.14. Thus, the only issue presented is whether those convictions are rendered invalid by the inconsistency in the verdict. In casting its decision in terms of the sufficiency of the evidence, the court of appeals failed to understand that "'[t]he question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached.'" *Harris*, 454 U.S. at 348 n.20 (*quoting Jackson* v. *Virginia*, 443 U.S. at 319-320 n.13)."

" *See, e.g., United States* v. *Jefferson*, 714 F.2d 689, 699 (7th Cir. 1983); *United States* v. *Whitten*, 706 F.2d 1000, 1006 (9th Cir. 1983); *United States* v. *Ward*, 696 F.2d 1315, 1319 (11th Cir. 1983), *cert. denied*, No. 82-6497 (May 16, 1983); *United States* v. *Ray*, 641 F.2d 222, 224-225 n.6, 227 n.10 (5th Cir.), *cert. denied*, 454 U.S. 861 (1981).

" To the extent that the evidence were truly insufficient *under* traditional standards to establish the facilitated offense, the Section 843(b) conviction would have to be reversed quite without regard to the consistency of the verdict on *any other* counts. *See United States* v. *Terry*, 702 F.2d 299, 321 n.33 (2d Cir. 1983), *cert. denied*, No. 82-1689 (May 16, 1983); *United States* v. *Bailey*, 607 F.2d 237, 245 (9th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980). The court of appeals' confusion over the issues of the sufficiency of the evidence and the consistency of the verdict is illustrated by its reliance (Pet. App. 2a, 7a) on *Bailey*, which involved a conventional challenge to the adequacy of the government's proof and did not present an inconsistent verdict question.

B. The Court Of Appeals Erred In Creating An Exception To The *Dunn* Rule For Compound-Predicate Offenses

The court of appeals set aside respondent's convictions on the basis of an "exception[] to the application of the *Dunn* rule * * * where the defendant is charged with [a] violation of 21 U.S.C. § 843(b) and the underlying felony, said to have been facilitated, is reversed." Pet. App. 6a-7a (footnote omitted). The decisions of this Court contain no limitation on the categorical and unqualified nature of the *Dunn* rule, however, and the court of appeals erred in creating such an exception.

The court of appeals' exception to *Dunn*, although in accord with other decisions that have carved out an exception for convictions under Section 843(b),[*] is unjustified and squarely incompatible with the rationale of the *Dunn* rule as consistently followed by this Court for more than half a century. *Dunn* acknowledges the unreviewable power of the jury to acquit as a result of "lenity," "compromise," or "mistake" (284 U.S. at 393-394), and it recognizes that such an acquittal "'does not show that [the jurors] were not convinced of the defendant's guilt'" (284 U.S. at 393 (citation omitted)). These considerations are no less applicable where, as in this case, one offense includes as an essential element the commission of an underlying offense—that is, "compound-predicate" offenses."

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[*] *See United States* v. *Brooks*, 708 F.2d 1273, 1278-1279, *reh'g denied*, 712 F.2d 1419 (10th Cir. 1983) (Table); *United States* v. *Hannah*, 584 F.2d 27 (3d Cir. 1978); *see also United States* v. *Berardi*, 675 F.2d 894, 901 n.15 (7th Cir. 1982).

" Compare *United States* v. *Upshaw*, 685 F.2d 1202 (9th Cir. 1982) (inconsistency in the verdict that bears on an

Indeed, the premise of the decision in *Dunn* is in fact the likeliest explanation of the verdicts in this case. The evidence of respondent's guilt on the charges of which she was acquitted was generally quite strong. Since, however, as the prosecutor characterized it in his closing argument, respondent was "not the heavy • • • [but rather a] small-time partic[i]pant in a major narcotics organization" (Tr. 1208), the jury may have been moved by leniency to acquit respondent of the cocaine conspiracy even though it was equally convinced of her guilt on that count as on the telephone facilitation counts on which she was convicted. Especially in light of the instruction to the jury that "[e]ach charge and the evidence pertaining to it should be considered separately" and that "[t]he fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged" (Tr. 1297; J.A. 24),[20] such leniency could, as *Dunn* recognizes, fully account for the jury's verdict.[21]

In addition, *Dunn* itself directly forecloses the exception conceived by the court of appeals for compound-predicate offenses. In *Dunn*, the defendant was convicted on one count of maintaining a common

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essential element of the offense would not be a ground to set aside the conviction; no inconsistency found).

[20] Compare page 17 note 21, supra.

[21] That the jury acted deliberately and conscientiously in returning its verdict is shown by the fact that it acquitted respondent on one count (Count 6) of telephone facilitation under Section 952(b). Count 6 was based on respondent's telephone call to an airline to change her husband's flight reservation for a trip to St. Louis (Tr. 629-631; J.A. 22-23). This call was not on its face demonstrably related to a drug transaction, and respondent was acquitted of the charge.

nuisance by keeping liquor for sale, in violation of 27 U.S.C. (1928 ed.) 33, and was acquitted on two counts (27 U.S.C. (1928 ed.) 12) of unlawful possession and unlawful sale of liquor. The evidence was identical on all three counts, and the nuisance count was based on the same conduct alleged in the possession and sale counts. See *Dunn*, 284 U.S. at 391; *id.* at 394-395, 397, 398, 407 (Butler, J., dissenting). The nuisance statute provided (27 U.S.C. (1928 ed.) 33 (emphasis added)):

> Any • • • building • • • or place where intoxicating liquor is *manufactured, sold, kept, or bartered in violation of this chapter* • • • is hereby declared to be a common nuisance • • •.

Likewise, the nuisance count in the indictment alleged (see 284 U.S. at 394 (Butler, J., dissenting) (emphasis added)) that the defendant "did • • • maintain a common nuisance, in that and there *knowingly and willfully committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor* • • •."[22] Thus, the nuisance charge on which *Dunn* was convicted involved a compound offense that included as an essential element the commission of a predicate offense—possession or sale—on which the defendant was acquitted. See 284 U.S. at 395 (Butler, J., dissenting).[23] In holding on

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[22] As Justice Butler's dissenting opinion described the charges (284 U.S. at 395, 402-403):

> The nuisance charged is specifically limited to the "keeping for sale" of the six drinks mentioned. The unlawful possession count is limited to the same drinks. The unlawful sale alleged is limited to six drinks. The

this record that "[c]onsistency in the verdict is not necessary" (284 U.S. at 393), the Court's decision establishes that the *Dunn* rule does not admit of the exception for compound-predicate offenses adopted by the court below."

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evidence showed that the same liquor constituted the sole basis of each count.

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[There,] there is a verdict of not guilty on one count and a verdict of guilt on another, and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count * * *.

See also 41 Yale L. J. 932, 933 (1932); 45 Harv. L. Rev. 931, 931-932 (1932).

* This Court has never recognized any exception to the *Dunn* rule. Contrary to the understanding of the court of appeals (Pet. App. 6a n.1), *Hartzel* v. *United States*, 322 U.S. 680 (1944), does not stand for any such exception. In *Hartzel*, three defendants were convicted of conspiring with one another; thereafter, the convictions of two of the co-conspirators were set aside on grounds of insufficient evidence (see 322 U.S. at 682 n.3). In that posture, the evidence was necessarily inadequate to establish that Hartzel had entered into a conspiracy with the other defendants as alleged; the government accordingly acknowledged in this Court that Hartzel's conspiracy conviction could not be sustained (Brief for the United States at 4 n.1, 23 n.2 (No. 521, 1943 Term)), and the Court agreed with this concession (322 U.S. at 682 n.3). *Hartzel* thus turned on the sufficiency of the evidence under traditional standards to support the conspiracy charged and—because the jury had convicted all the defendants of conspiracy—did not in any way involve the issue of an inconsistent verdict; indeed, neither the parties nor the Court cited to *Dunn* or to *Dotterweich*, which had been decided the same Term as *Hartzel*.

The court of appeals also noted (Pet. App. 6a-7a n.1) that lower federal courts have developed certain exceptions to *Dunn*

In establishing an exception to *Dunn* for the compound offense in Section 843(b), the courts of appeals have relied on the following passage in the *Dunn* opinion (284 U.S. at 393 (citations omitted)):

> Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.

Noting that the Section 843(b) offense and the offense alleged to have been facilitated are "interdependent" (*United States* v. *Hannah*, 584 F.2d at 30) rather than "separate and distinct" (*United States* v. *Brooks*, 703 F.2d at 1278), these courts have read

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in cases in which a defendant is convicted of conspiracy. See, *e.g.*, *United States* v. *Patterson*, 678 F.2d 774, 780-781 (9th Cir.), cert. denied, 459 U.S. 911 (1982); *United States* v. *Morales*, 677 F.2d 1 (1st Cir. 1982); *United States* v. *Dos-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 n.3 (9th Cir. 1981). We doubt the soundness of these exceptions under *Dunn*, especially in light of this Court's decision in *Standefer*. See *United States* v. *Espinoza-Cerpa*, 630 F.2d 328, 330-333 (5th Cir. 1980). However, the correctness of those exceptions to *Dunn*—which appear to rest on the view that "courts should take a closer look at conspiracy convictions [in inconsistent verdict cases] where the jury's verdict on other counts indicates some doubt that a conspiracy actually took place" (*United States* v. *Morales*, 677 F.2d at 3)—is not presented here, since respondent was acquitted on the cocaine conspiracy count and the court of appeals based its decision on the compound nature of the substantive telephone facilitation offense.

Dunn to permit a special rule for such compound-predicate offenses.

Dunn does not support this exception. Initially, the correctness of the treatment of res judicata in *Dunn* was open to serious question even at the time of the decision. Prior to *Dunn*, the Court had recognized the applicability in criminal cases of preclusion doctrines such as res judicata.[25] In light of those decisions, the brief discussion of res judicata in *Dunn* was of doubtful validity.[26]

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[25] See, *e.g.*, *United States* v. *Adams*, 281 U.S. 202, 205 (1930); *Collins* v. *Loisel*, 262 U.S. 426, 430 (1923); *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916); *Frank* v. *Mangum*, 237 U.S. 309, 334 (1915); *Coffey* v. *United States*, 116 U.S. 436, 443 (1886), disapproved on other grounds, *United States* v. *One Assortment of 89 Firearms*, No. 82-1047 (Feb. 22, 1984), slip op. 3-7; cf. *Murphy* v. *United States*, 272 U.S. 630, 632 (1926); *Stone* v. *United States*, 167 U.S. 178, 187 (1897).

[26] See *United States* v. *Carbone*, 378 F.2d at 422 & n.6; Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory*, 36 Okla. L. Rev. 473, 483 (1983); Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 Colum. L. Rev. 999, 1005 (1960); Comment, Ashe v. Swenson: *Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Colum. L. Rev. 321, 332 n.68 (1971).

Interestingly, the opinion in *Dunn* was written by Justice Holmes at the age of 90 and was his last for the Court (see *Harris*, 454 U.S. at 346 n.15; *United States* v. *Carbone*, 378 F.2d at 422); *Dunn* was announced on January 11, 1932, and Justice Holmes submitted his resignation on January 12 (see 284 U.S. at VII). In his letter of resignation Justice Holmes explained that "[t]he condition of my health makes it a duty to break off connections [with the Court]" (*ibid.*); see also 284 U.S. at V-VI. In private correspondence dated January 3, 1932, Justice Holmes noted:

> You write such interesting and entertaining letters that I blush not to do likewise, but I can't. I have not been very well and I find it difficult to write; difficult physically and mentally. I hope to get back to normal but at present life is hard. We begin our sitting again on Monday. I have but one opinion to deliver, another being held up for tinkering to meet a long dissent from Butler—agreed to by no one else I believe.

The Holmes-Einstein Letters 335 (Peabody ed. 1964) (quoted in *United States* v. *Carbone*, 378 F.2d at 422 n.6); see also *id.* at 330-331, 338, 342; II *Holmes-Laski Letters* 1334, 1337, 1340, 1345, 1346, 1360 (Howe ed. 1953); F. Biddle, *Mr. Justice Holmes* 196-198 (1942).

In any event, whatever its validity then, the res judicata discussion in *Dunn* has long since been repudiated by subsequent decisions of this Court. See, *e.g.*, *Sealfon* v. *United States*, 332 U.S. 575 (1948); *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Simpson* v. *Florida*, 403 U.S. 384 (1971). Notwithstanding this development, the *Dunn* rule remains of continued and undiminished vitality based, as the Court has recognized, on "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris*, 454 U.S. at 346 (footnote omitted); see also *id.* at 346 n.15; *Standefer*, 447 U.S. at 22; *Hamling* v. *United States*, 418 U.S. at 101.[27] In accordance with this Court's analysis, the lower federal courts—with the exception of the decisions under Section 843(b)—as well as commentators have concluded that the *Dunn* rule properly rests on the role and prerogatives of the jury rather than on principles of res judicata.[28] Thus, the court of appeals in this case,

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[27] Indeed, even before *Sealfon*, the Court reaffirmed the *Dunn* rule without any reference to the res judicata rationale. See *Dotterweich*, 320 U.S. at 279.

[28] See, *e.g.*, *United States* v. *Uzzolino*, 651 F.2d 207, 213 (3d Cir.), cert. denied, 454 U.S. 965 (1981); *United States* v. *George*, 497 F.2d 1068, 1085-1086 (7th Cir. 1974), cert. de-

like the courts in *Hannah* and *Brooks*, misperceived the basis of the *Dunn* rule as expressed in the decisions of this Court over the last 50 years and incorrectly resurrected a long-discredited conception of the inconsistent verdict doctrine.[28]

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nied, 420 U.S. 909 (1975); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974); *United States* v. *Fox*, 453 F.2d 1235, 1238 n.22 (D.C. Cir. 1970); *United States* v. *Carbone*, 378 F.2d at 422-423; *United States* v. *Maybury*, 274 F.2d 899, 906 (2d Cir. 1960); Bickel, *supra*, 63 Harv. L. Rev. 650-651; 3 L. Orfield, *Criminal Procedure Under the Federal Rules* § 23:57 (1966); 5 *id.* § 31:10 (1967); Perkins, *supra*, 15 Crim. L. Bull. at 409-410; Trubitt, *supra*, 36 Okla. L. Rev. at 483-484; Comment, *supra*, 71 Colum. L. Rev. at 332-333; 35 Md. L. Rev. 535, 540-541 (1976).

[28] Furthermore, there is no reason to apply preclusion principles to different counts jointly tried in a single proceeding. The doctrines of res judicata and collateral estoppel are designed to "protect[] litigants from burdensome relitigation and • • • promot[e] judicial economy." *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984), slip op. 7; see also *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4. Such considerations are simply inapposite to jury verdicts on multiple counts at a single trial, and preclusion principles are accordingly inapplicable. See, *e.g.*, *Arnold* v. *Wyrick*, 646 F.2d 1225, 1228 (8th Cir. 1981); *United States* v. *Zane*, 495 F.2d at 690; 5 L. Orfield, *Criminal Procedure Under the Federal Rules* § 31:10, at 136 (1967); 3 C. Wright, *Federal Practice and Procedure: Criminal* § 514, at 18 (2d ed. 1982); *cf. Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 7 n.9. And certainly the possibility that the jury exercised lenity in simultaneously acquitting on some counts and convicting on others, even though convinced of the defendant's guilt on all counts, indicates that preclusion principles should not be applied in a single proceeding involving inconsistent verdicts.

Moreover, while purporting to create a narrow exception, the res judicata theory advanced in *Hannah* and *Brooks* and accepted by the court below would effectively overrule *Dunn* in any case involving an inconsistency in the verdicts returned against a single defendant. Nothing in the theory logically confines it to inconsistent verdicts on compound-predicate offenses. On the contrary, if *Dunn* rests on principles of preclusion and is limited to cases in which an initial acquittal on one count would not bar a subsequent prosecution on the other count, few if any inconsistent verdicts would be sustained. Indeed, under modern principles of collateral estoppel, the inconsistent verdict involved in *Dunn* itself would be impermissible, since the jury's acquittal of unlawful possession and sale of liquor would foreclose a later prosecution for maintaining a common nuisance by keeping the same liquor for sale. See pages 22-24, *supra*; *United States* v. *Carbone*, 378 F.2d at 422; Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649, 650 (1950). The analysis underlying the exception created for the Section 843(b) offense thus would eviscerate the *Dunn* rule and constitutes nothing less than a fundamental rejection of the rationale of the inconsistent verdict doctrine.[29]

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[29] Having found that the verdicts were inconsistent, the court of appeals reversed respondent's convictions on the three counts under Section 843(b). We submit that the proper disposition, in the event that the inconsistent verdicts are not allowed to stand, would be to remand for a new trial on those counts. See *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 400 n.11 (1972); *Crawford* v. *Fenton*, 646 F.2d 810, 817 n.8 (3d Cir.), cert. denied, 454 U.S. 872 (1981); *United States* v. *Maybury*, 274 F.2d at 904-906 (opinion of Friendly, J.), 908 (opinion of L. Hand, J.), discussed in *Harris*, 454 U.S. at 342 n.7; Note, *Criminal Law: Validity of*

Inconsistent Verdicts, 1961 Duke L. J. 133, 136-137 n.14; see also *Dunn* v. *United States*, 284 U.S. at 406-407 (Butler, J., dissenting) (inconsistent verdicts should be set aside and new trial ordered). By its outright reversal, the court of appeals has unreasonably expanded the consequences of the jury's inconsistency and, in effect, has immunized respondent for crimes that the government has proven by sufficient evidence beyond a reasonable doubt. Cf. *Harris*, 454 U.S. at 347; *Standefer*, 447 U.S. at 25. We are aware of no reason that would bar a retrial in this case. Since the government's evidence at the initial trial was adequate, the Double Jeopardy Clause does not forbid a second proceeding. See *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). Likewise, because of the inconsistency in the verdict, the basis of the jury's acquittal cannot satisfactorily be determined; as *Dunn* recognized (284 U.S. at 393 (citation omitted)), the inconsistent verdict " 'does not show that [the jurors] were not convinced of the defendant's guilt' " but only " 'that either in the acquittal or the conviction the jury did not speak their real conclusions.' " See also Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1015 n.47 (1980). In these circumstances the doctrine of collateral estoppel does not preclude a new trial. See *Standefer*, 447 U.S. at 25 n.17; Comment, *Inconsistent Verdicts in Illinois Criminal Trials*, 10 J. Mar. J. Prac. & Pro. 263, 285 (1977); see also Thau, *Collateral Estoppel and the Reliability of Criminal Determinations*, 70 Geo. L. J. 1079, 1085 (1982); Restatement (Second) of Judgments § 29(4) and (5) & comments f and g (1982); cf. Ohio v. Johnson, slip op. 7 n.9 ("where the State has made no effort to prosecute the charges serially, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable"). Although this argument was not presented below, the court of appeals' resolution of the inconsistent verdict issue necessarily raises the question of the proper disposition of the case. See 28 U.S.C. 2106. Accordingly, we suggest that, if the Court disagrees with our submission on the validity of the jury's verdict, the appropriate course would be to remand to the court of appeals for consideration of the issue of a new trial. See *Bravo* v. *United States*, 466 U.S. 356, 412 n.19 (1960).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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No. 83-1307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

BETTY LOU POWELL,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

The Charges.

The respondent entered a plea of not guilty to the 15-count superseding indictment the day before trial [Dkt. Entries 14 June 82]. Count One charged a conspiracy to possess with intent to distribute cocaine and listed six overt acts. Overt Acts No. One through Four specifically referred to the telephone conversations that were the subject of the "telephone counts" (21 U.S.C. 843(b)) in Counts Three - Six:

> 1. On or about April 11, 1982, at approximately 8:02 p.m., within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with her son, Jeff, about calling an illegal drug customer and asking him for payment.
>
> 2. On or about April 11, 1982, at approximately 8:10 p.m.,

within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with Sandy Segal about payment for illegal drugs.

3. On or about April 16, 1982, at approximately 4:19 p.m., within the Southern District of California, defendant BETTY LOU POWELL had a phone conversation with Ron Powell concerning drugs to be left for "Sam".

4. On or about April 20, 1982, at approximately 7:15 a.m., within the Southern District of California, defendant BETTY LOU POWELL called TransWorld Airlines about a reservation for Ron Powell, travelling under the false name of Chuck Dixon.

Overt Act Five alleged on the evening of 23 April 1984 respondent drove a Lincoln Continental containing approximately 2,013.2 grams of cocaine. Also, Overt Act Six alleged on the same date her possession

of passports of Ronald and Jeffrey Powell.[1] (J.A. 3-4)[2]

Count Two charged the conspiracy to possess with intent to distribute quaaludes, and as the single Overt Act alleged on 23 April 1982 respondent's driving of the Lincoln Continental containing approximately 2,700 dosage units of quaaludes (J.A. 4-5).

Count Three alleged:

> On or about April 11, 1982, at approximately 8:02 p.m., within the Southern District of California defendant BETTY LOU POWELL did knowingly and intentionally use a communication facility, namely, a telephone, in committing and causing

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[1]/"Ron" refers to Ronald Lee Powell, the husband of petitioner, and "Jeff" refers to Jeffrey Scott Powell her 17-year-old son. The shortened first names are used because they were so addressed during the many monitored telephone conversations.

[2]/"J.A." refers to the Joint Appendix. "Pet. Cert." refers to the Petition for Certiorari including the appendix; "Govt. Brief" refers to the Brief of the United States on the merits; and "Brief Opp." refers to the respondent's Brief in Opposition and its appendices.

and facilitating of a controlled substance offense, in violation of Title 21 United States Code, sections 846 and 841(a)(1), that is, conspiracy to possess with intent to distribute and possession with intent to distribute cocaine; in violation of Title 21, United States Code, section 843(b). (J.A. 5).

Counts Four, Five, and Six are identical to Count Three except that the dates and times were 11 April 1982 at 8:10 p.m.; 16 April 1982 at 4:19 p.m.; and 20 April 1982 at 7:15 a.m.

Counts Seven and Eight charged on 23 April 1982 respondent with two assaults on three FBI agents (J.A. 6-7).

Count Nine charged on 23 April 1982 respondent with possession with intent to distribute 2,013.2 grams of cocaine, and Count Ten charged on the same day her with possession with intent to distribute approximately 2,700 dosage units of quaaludes. Counts Nine and Ten are the sub-

stantive counts that "track"[3] the conspiracy counts set forth in Counts One and Two.

Counts Eleven - Fourteen charged the possession of unregistered silencers and machine guns lacking serial numbers (J.A. 7-8).

Count Fifteen charged her false statement to acquire the services of appointed counsel (J.A. 8).

Evidence.

For the first 23 days of April 1982 the FBI conducted a court authorized telephone tap on the Powell family residence. Although the Government introduced 83 recorded telephone conversations during the trial, "several hundred" were monitored (R.T. 695). At the start of the tap Ron

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3/ The judge instructed that the substantive counts "track" the conspiracy counts because of the related references to the cocaine and quaaludes found in the trunk of respondent's car (R.T. 1359-61).

Powell was in Europe, and his 17-year-old son was in charge of the household and his business. Respondent and her 10-year-old son Mike lived in this house. Until 23 April 1982 the parties apparently were unaware that the phones were tapped (R.T. 691), and during these private conversations their speech was uninhibited and touched upon personal problems.

On 3 April 1982 (11:49 a.m.)[4] the respondent complained of her son's degrading obscenities[5] and threats:

> Oh, he (Jeff) always gives me problems, but he -- he's a man. He rules you know....Tells me he's gonna knock my teeth down my throat. I mean, that's a nice way for a boy to talk to his mother. (RT 325)

On April 3, 1982 (11:10 p.m.)

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[4]/ This reference is to the time the taped telephone conversation started and will be used to signify monitored telephone conversations.

[5]/ Jeff referred to his mother as "a motherfucking cunt" (R.T. 324). In a taped conversation with his father, Jeff referred to her as "a fucking idiot," and Ron responded, "She's goofy." (R.T. 395)

respondent tells Jill Spindle that Sam, Jill's husband is "a cuckoo" (R.T. 350) and gives advice to this other abused mother "from someone who's been around for a long time and been through all the slappings and the beatings." (R.T. 351) On 7 April 1982 (1:42 p.m.) Ron called from Amsterdam and told Jeff about a girl named Caroline he met there but does not speak with the respondent (R.T. 378). On the same day (6:45 p.m.) Jeff tells Jack Skidmore, "You know that black stuff you left here ... My fucking mom threw it away." (R.T. 423). She didn't know what it was. It was wrapped up like you left it." (R.T. 424).

On 8 April 1982 (5:52 p.m.) Jeff who is sick tells John Washington that his mother will assist him in the transaction (R.T. 428). In a later conversation with John, Jeff stated, "She says no, because my dad treats her like shit, and she won't do

anything for him" (R.T. 429). Betty then tells John, "I'm not doing it. I got a regular job and I don't want no part of none of this shit" (R.T. 430). She added, "And I don't want no part of him (Ron) either" (R.T. 430).

On 10 April 1982 (10:08 p.m.) the respondent called Jeff at home (R.T. 441). Jeff asked respondent how to dye Easter eggs. Sam was there at the house, and she asked, "Did you forget about Sam?" She said Sam had been back and forth to Big Bear and thought you were arrested (R.T. 442). Respondent then proceeded to tell Jeff how to dye Easter eggs (R.T. 443).

On 11 April 1982 (7:30 p.m.)[6] Betty complained to an unknown Elmer about Ron taking their daughter Rachel to Europe (R.T. 462-4). She felt like a stranger in

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[6]/ After commencing deliberations, the jury had this taped replayed (R.T. 1378-82).

her own house. "It's gotten so totally out of hand that I'm like the outsider, and whenever Ron's around and Jeff's around, I mean, it's like I'm invading my own bedroom by coming in here" (R.T. 464). She has a low opinion of Sam[7] and told Elmer that when Sam had suggested he would bring some money by she had told Sam, "I'm not running my life around you ding-dongs.... I'm sick of all this shit, ... You know, you wrecked my life by making me move down to San Diego" (R.T. 465). Because Jeff had been kicked out of school and was not returning she referred to him as a "bozo-brain" (R.T. 466). A half hour later on the same date (8:02 p.m.)[8] Jeff phoned his mother that his dad's plane was two hours late (R.T.

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[7]/ "The biggest pain in the ass God ever created." (R.T. 465)

[8]/ This taped telephone conversation served as the basis of Count Three and was also replayed for the jury. (R.T. 1382-85).

467-8; J.A. 9). Jeff mentioned the flowers and bunny rabbit he sent to his mother (R.T. 468; J.A. 10). At the end of the conversation Jeff asked his mother, the respondent, to do him a favor and call the Thin Man. Jeff asked her to ask him if he has the "coupons" and to bring them over. Jeff referred to "coupons," but the respondent did not use that word (R.T. 469; J.A.9-11).

Minutes after that call (8:10 p.m.)[9] respondent called Sandy Segal who was identified as the Thin Man (R.T. 470-471; J.A. 11). Respondent asked if Samuel had visited him (R.T. 471; J.A. 12). She asked for the "money" for Ron because of the arrangement Sam made (R.T, 471; J.A. 12). Respondent had told Sam the night before that the following day she was going

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[9]/ This telephone conversation was the basis of Count Four and also was replayed for the jury. (R.T. 1385-93).

to take Mike, her young son, out for brunch and an Easter egg hunt, and Sam says he'll be over before ten o'clock. Respondent said, "I said, 'From now on, people want to do something, they'll do it around me.'" She then added, "And I mean it." I'm sick of it, Sandy" (R.T. 472: J.A. 12). In response to a question from Sandy if Ron was coming home tonight, she advised that he would be lucky to get home by eleven. They discussed her car being towed from the Sears parking lot and the difficulty in getting a response from the police. After a discussion of other topics she described her trip to Julian and the crowded highways (R.T. 473: J.A. 13-16). Respondent was describing her trip back from Alpine, when Sandy interjected, "He wants the coupons tonight, huh?" (R.T. 478; J.A. 16) In response to Sandy's question whether Ron knew he had them, the respondent stated, "He knows that Sam told you." Sandy laughs

at this response, and the respondent stated, "See, he don't believe, see. I don't either." Respondent stated:

> "Oh, he got real indignant last night. Oh, he just got almost belligerent, and then he said, 'Well, Betty, you should have some say' and all of a sudden I've got an I.Q. You know, and I said, 'This ain't my business, you know. Ain't my movie.'" (R.T. 472-478; J.A. 11-16).

On 16 April 1982 (3:30 p.m.)[10] Ron tells Sam Spindle that if the worst happens and Jeff and he are not at home, "then I'll just leave that with her (respondent) (R.T. 581-82).

About an hour later (4:19 p.m.)[11] Jeff telephoned the respondent at home and told her that Ron and he were going to a baseball game. Ron gets on the line to

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[10]/ The jury also requested that this tape be replayed (R.T. 1393-4).

[11]/ This telephone conversation is the basis for Count Five, and the jury also requested that it be replayed (R.T. 1397-1403).

tell Betty that he is going to look at a particular house and had looked at others. He would be leaving a "sheet" on the bed concerning the house he liked. Ron shifted the conversation from houses to leaving a "package" for Sam on the bed. Ron instructs the respondent to hurry home because Sam is going to come to the house right after she gets there. Ron then shifts the conversation back to houses and refers to the cost of a house as "a million and half coupons." The conversation turns on the number of rooms, construction, and size of the monthly payments for the house (R.T. 599-604; J.A. 17-21).

On 20 April 1982 (7:15 a.m.)[12] Respondent changes the airline reservation for Charles Dixon to the following day and gives a phone number that is not her own

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[12]/ This tape is the basis for Count Six and was also replayed for the jury (R.T. 1394-6).

(R.T. 628-630; J.A. 21-22). At the time Ron made the reservation he asked that his name not be put on it, and when asked by the travel agent who's name he wanted on it, he said he didn't know and to make one up so the travel agent made up "Chuck Dixon" (R.T. 743-4).

On the evening of 23 April 1982 Jeff learned from Ron that the house's phones were bugged and he told his mother there was trouble and she had to leave (R.T. 896). Respondent left with her 10-year-old son in her Lincoln and was followed by FBI agents wearing sports clothes in unmarked cars (R.T. 45-46, 57, 66). The FBI agents pursued respondent who soon became aware she was being followed (R.T. 1091). The FBI agents stopped and surrounded respondent's car and were pounding and banging on it and telling her to get out (R.T. 1091-1094, 1147). Respondent, in the car with a screaming

child, claimed not to hear them and did not hear them state they were FBI. The respondent drove away striking one agent in the leg and almost hitting another (R.T. 95-96, 54; Counts Seven and Eight). The respondent claimed she did not see the agent hit, was petrified by the banging on the car, and tried to get away from these strangers (R.T. 1118-1121, 1093-1094). The FBI agents did not produce their identification until after respondent was arrested by a police officer who came on the scene. He did not know who the "gentlemen" (FBI) were and "pushed them out of the way and told them to back off" (R.T. 1152).[13]

FBI Agent Bobbit was asked if there was anyway he could tell from the conversation whether the package Sam

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[13]/ The acquittal of these counts was not "leniency" as the Government contends, but a jury determination adverse to the Government on a hotly contested factual dispute.

Spindle picked up contained either quaaludes or cocaine. He couldn't tell positively, and it could have been either one (R.T. 728).

The defense introduced a taped conversation of 3 April 1982 (11:25 p.m.) in which respondent and Jill Spindle commiserated their difficult marriages.[14] Respondent said she filed separate income tax returns because Ron doesn't work (R.T. 862). Her daughter Rachel said respondent never had the guts to leave Ron when he treated her like a tramp and that's why the kids didn't respect her (R.T. 864). Respondent stated, "You, you know I love the man myself, but I mean there's something that you are better off without" (R.T. 865). Respondent wanted an education for her daughter Rachel and was willing to

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[14]/ Jill Spindle had been beaten so badly by her husband that she had to be taken to a hospital for treatment (R.T. 329).

"hock my mother's house to pay for it." But Ron, the father, took the daughter to Europe and paid for everything. Respondent stated, "Now you know, I'm the looney tuney and daddy's wonderful" (R.T. 867).

The defense introduced a former fellow worker and three teachers as character witnesses to establish that she was a truthful and law abiding person (R.T. 879-888, 888-90, 916-8, 1136-9).

Jeff, respondent's 17-year-old son, testified (R.T. 892) he took messages of his father's involving sale of cocaine, but to his knowledge his mother did not ever participate in that business (R.T. 893-4). On 23 April 1982 Ron told Jeff that the phones were bugged, and he instructed his son to clean up the house (R.T. 895). Jeff told his mother that there was trouble and she had to leave (R.T. 896). Jeff loaded the trunk of the Lincoln out of the presence of his mother

(R.T. 899-900). Jeff testified that his father never used the "hot box" found in the house for determining purity of cocaine in the presence of his mother (R.T. 901). The same was true for the cocaine purity test kit (R.T. 902).[15]

Jeff had put packages of quaaludes, the silencers, and the machine guns in the trunk. He also put $32,000 in the trunk [RT 909].

Jeff admitted he saw cocaine when he was 12-years-old and first saw it in the possession of his father in September 1981 (R.T. 928-9). Jeff estimated that his father's net gross was about $15,000 a week (R.T. 930). Jeff gave his mother money. He rarely saw his father give his mother money; the last time was January 1982 (R.T. 931). Jeff and his father bought the

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[15]/ Both these items were found pursuant to a search warrant of the Powell residence.

groceries (R.T. 932). His father sells quaaludes and marijuana as well as cocaine (R.T. 932). His father kept the money with the dope under the house so that his mother did not know where it was kept (R.T. 933). Jeff stated that the reference on the telephone about "coupons" meant "money" (R.T. 934). Sandy Segal is called the "Thin Man" because he is so fat (R.T. 941-2). He was holding money from Sam for a purchase of cocaine and had himself purchased cocaine from Jeff (R.T. 942).

Jeff gave orders to his mother, and she followed them (R.T. 954). The orders were to tell her what to do, and Jeff admitted hitting his mother (R.T. 955). Although his mother had yelled at him and told him what to do he never did it (R.T. 956). While his father was gone Jeff took care of the drug business, but he doubted that his mother knew that (R.T. 957).

To his knowledge his mother, the respondent, was unaware of the contents of the package, a paper bag, picked up by Sam Spindle (R.T. 963). Jeff testified that "stuff" was kept in cubby hole under the house that you got to through the garage. This included cocaine, quaaludes, and the money (R.T. 963-4). The scale and hot box were kept in a drawer in his mother's bedroom, but she had no idea what they were (R.T. 968). Jeff put or sneaked the passports into respondent's purse without her knowing about it (R.T. 969). His mother slept in the guest bedroom on the third floor or in the family room, and they weighed the dope when she was not present (R.T. 985).

The respondent was married to Ron for 19-1/2 years and had known him for 21 years. She "knew somewhat of what he was doing (cocaine business) because he was an addict," but she detested drugs and thought

people who used cocaine were weak (R.T. 1002-3, 1005). She knew he was selling cocaine, but not quaaludes (R.T. 1043).

When asked why she had no intention of staying married to Ron but stayed with him, she answered:

> Partly because I felt sorry for him and partly because I still love him very much. I thought I could help him succeed over this addiction. (R.T. 1007)

Respondent thought that Sam Spindle was returning money that had been loaned to him by Ron and not for narcotics (R.T. 1014-15). She had made the reservations in the name requested by her husband but she did not know why he used that name (R.T. 1017). Respondent testified that Sam came over and picked up a package from the master bedroom (R.T. 1020). Respondent did not know who the Thin Man was because she did not talk in code (R.T. 1042).

She described her relationship with her husband:

> I suspected he was selling drugs to him (John Washington) but it wouldn't have mattered if I laid down with a razor blade slashing my wrists. It wouldn't have stopped him. I was told I was dirt. I was told that I was nothing, that I had no control over what went on in the house. If I wanted to stay and be around my childen, I could stay, but if I wanted to leave, I could leave, but not take my children. In other words, my life was in jeopardy. (R.T. 1046-7).

Respondent had been following Jeff's orders since he was 16 and they came down to San Diego (R.T. 1055). She refused his orders at one time when asked to deliver drugs to J.W. (John Washington) (R.T. 1055).

Respondent knew about "coupons" because that the was term used by her husband for money (R.T. 1065). On 16 April respondent agreed to give a package to Sam at her husband's request (R.T. 1068). With reference to the statement "from now on.

people want to do something they will do it around me," the respondent meant she was tired of being late for work and having her calendar messed up so that she was going to make her own arrangements and they would have to make theirs (R.T. 1128-9).

Instructions.

The trial judge in addition to instructing that a jury should consider each charge separately (R.T. 1287; J.A. 24) also stated:

> Unless the Government proves beyond a reasonable doubt that the defendant committed every element of an offense with which she is charged, you must find her not guilty (R.T. 1289). (Emphasis added.)

The judge gave an aiding and abetting instruction and described willful participation (R.T. 1289).

The court also instructed:

> "Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that a defendant aided and abetted a crime, unless you find

> beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator (R.T. 1290).

Conspiracy was described as "a kind of partnership for criminal purposes in which each member becomes the agent of every other member" (R.T. 1291). Mere similarity of conduct and association was not sufficient to establish a conspiracy although a conspirator need not know the full details of the conspiracy (R.T. 1293). The court instructed on the elements of the four telephone counts which required that she did them knowingly and intentionally (R.T. 1314; J.A. 25). "Knowingly" did not include acts done "because of mistake, accident, or other innocent reason." (R.T. 1323-4).

On 2 July 1982 after jury deliberations had commenced the judge received a note from the jury which stated:

> Judge Enright, the jury would like you to guide us on the following matter: When a count deals with a specific controlled substance and the jury is unable to determine if it related to that specific substance, does the controlled substance have to be that named? Specifically, the count states, Quote, 'intent to distribute cocaine.'
>
> Some of the jury feels it is a controlled substance but are not sure if this controlled substance is quaaludes or cocaine. The count specifically states cocaine. (R.T. 1353-4)

The Court then instructed that as to Counts One, Two, Nine and Ten (cocaine and quaalude conspiracies and substantice counts) the jury had to judge each charge by the specific substance designated and no other (R.T. 1359-62).

On 6 July 1982 another note was received from the jury:

> Judge, we are still at an impasse as to the facts on what was in the package. Most of jurors are sure the defendant knew there was either quaaludes or cocaine in the package. Since there is no evidence that the defendant knew whether it was cocaine or quaaludes, we must give her

> a not guilty because the court specifies -- the count specifies only cocaine. Is this a correct assumption? (R.T. 1372)[16]

The prosecutor suggested that this note might refer to the 16 April 1982 telephone count (Count Five) because of the "package" on the bed picked up by Sam Spindle, and the court accepted the prosecutor's suggestion that as to a telephone count if she had reason to believe it was a controlled substance that would be sufficient (R.T. 1372-3). Defense counsel stated that respondent had to know the specific substance in the package but he did not "quarrel" with the judge's statement of the law. (R.T. 1374).

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[16]/ This inquiry may have been caused by remarks of defense counsel in closing argument about the package Sam Spindle picked up: "How can you conclude from these conversations that it's for one or the other? It could have been for dope, but was it cocaine or was it quaaludes?" (R.T. 1262).

The Court then restated that as to Counts One, Two, Nine and Ten, the Government must prove a specific controlled substance, but as to the telephone counts stated:

> If you find that the so-called package contained either cocaine or quaaludes, if you find that it was a quote, "controlled substance," no matter which controlled substance it was, their proof would be sufficient if, in fact, the evidence shows that it was a controlled substance; to wit, either quaaludes or cocaine (R.T. 1376; J.A. 26).

The jury then had replayed six taped telephone conversations including the four that were the subject of the four telephone counts (R.T. 1377-1403). Within an hour and a half they reached a verdict (R.T. 1403).

Verdict

The jury returned a verdict of not guilty as to all counts except three telephone counts, Counts Three, Four, and Five

and the false statement count, Count Fifteen.[17]

Sentence.

The respondent was sentenced to four years concurrent on the three telephone counts and the false statement count (Counts Three, Four, Five, and Fifteen) pursuant to 18 U.S.C. 4205(b)(2). The Court of Appeals affirmed the false statement count, but reversed the three telephone counts. The Court of Appeals stated, "We reject the government's contention that we apply the concurrent sentence doctrine and not inquire into the asserted error as to Counts Three, Four and Five." Pet. Cert. 4a-5a.[18] After serving approximately

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17/ The Court of Appeals affirmed the false statement count, and this Court denied certiorari to that conviction (Sup.Ct. No. 83-6617, 18 June 84).

18/ The Ninth Circuit court will now review the merits of each conviction on appeal. United States v. DeWright, 730 F.2d 1255 (9th Cir. 1984) (en banc).

five and one-half months confinement, the respondent was released on bail pending final disposition of this case.

SUMMARY OF THE ARGUMENT

The Court of Appeals found the proof to support the telephone counts insufficient, so the permissible inconsistent verdict doctrine is inapplicable. Dunn v. United States, 289 U.S. 390 (1931) permits the limited result where the predicate offense of a telephone facilitation charge (21 U.S.C. 843(b)) is specifically charged in the same indictment and the proof of the conspiracy and telephone counts are the same. The jury's verdict of not guilty in this factual context precludes guilt on this specific predicate, an element of the telephone facilitation offense. Neither Dunn nor its progeny require the overruling of this unique exception to the inconsistent verdict doctrine unanimously recognized by the court of appeals who have

reviewed the issue.

Permitting reference to an unidentified predicate offense when the conspiracy charged included the four specific telephone counts is both ambiguous and deceptive and does not give fair notice to the defense of the offense charged. The telephone counts specifically referred to cocaine predicate offenses, but the trial judge in violation of Stirone v. United States, 361 U.S. 212 (1960), permitted the jury to convict on proof of either cocaine or quaaludes.

While representing respondent, trial defense counsel was engaged in a cocaine conspiracy and in other crimes with her alleged co-conspirator, her fugitive husband. This counsel also demonstrated disloyalty as her advocate by a concession of guilt contrary to respondent's testimony. The respondent did not consent to a waiver

of the required 30-day defense preparation period under the Speedy Trial Act.

ARGUMENT

I

Since the Jury Acquitted the Respondent of the Specific Predicate Conspiracy and Substantive Cocaine Offense, the Telephone Count Failed Because of Lack of an Essential Element

A. The Pleading, Evidence, and Instructions

The identity of the first four overt acts of the cocaine conspiracy (Count One) and the telephone counts is obvious, for the overt acts not only use the exact date and time but describe the alleged purpose of the call (i.e., asking for payment for drugs, drugs left for Sam, or a false name given to an airlines). Although the substantive conspiracy count refers to "on or about April 23, 1982" and "approximately 2,013.2 grams of cocaine," the court instructed that any "measurable amount" was the subject of this count (R.T. 1314).

The four telephone counts have no relationship to the quaalude conspiracy or the substantive count (Counts Two and Ten). The evidence inextricably envelops not only the dope and telephone counts, but also the weapons counts. The judge instructed the jury that the substantive offenses "tracked" the conspiracy counts. The telephone counts specifically referred to cocaine as the targeted offense, and the only reasonable notice given by the pleadings was that the telephone counts were specifically referring to Counts One and Nine.[19]

B. Section 841(b).

In the Narcotics Control Act of 1956, Section 201(c) Congress created the new offense of use of communication facilities, which became 18 U.S.C. 1403.[20] The

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19/ Defense counsel in closing argument lumped the cocaine conspiracy and telephone counts together (R.T. 1252, 1262-3).

20/ See Conference Report No. 2546 (29 June 56) 1956 Cong. & Adm. News 3319.

language of 18 U.S.C. 1403 was similar to its successor 21 U.S.C. 843(b)[21], but both required the commission of the predicate offense. In United States v. Butler, 204 F.Supp. 339 (S.D.N.Y. 1962), the district court acquitted a defendant of an 18 U.S.C. 1403 violation because the defendant did not have knowledge of illegal importation of narcotics, the predicate offense of 21 U.S.C. 174.[22]

Section 843(b) replaced 18 U.SC. 1403 with the enactment of the Controlled Substances Act of 1970.[23] The language follows section 1403 except the term "felony" is substituted for "offense," and

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21/ Cf. United States v. Pierorazio, 578 F.2d 48, 49-51 (3d Cir, 1978)(a series of telephone counts could offer greater penalty exposure than the underlying conspiracy offense).

22/ To the same effect, see also United States v. Contrades, 196 F.Supp. 803 (S.D.N.Y. 1962)

23/ Pub. L. 91-513, sec. 403(b); 84 Stat. 1236 (1970).

the predicate offense may be any proscribed in this subchapter (Title 21, 800 series sections) or subchapter II (Title 21, 900 series sections). The first sentence reads:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. (Emphasis added.)

"[T]he commission of any act or acts constituting a felony creates the **sine qua non** or an essential element for the telephone count. "Felony" is a legal conclusion that is "any offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C.1(1) The drafters most likely intended to exclude simple possession of any controlled substance[24] or possession with intent to distribute a small amount of marijuana for no remuneration[25] as predicate offenses. If the telephone count was charged in addition to a specifically designated conspiracy or a substantive count, a conviction of both means the telephone count becomes ancillary or dependent upon the *designated* predicate offense.[26] See **Albernaz v. United States,**

24/ 21 U.S.C. 844, a maximum term of one year imprisonment.

25/ 21 U.S.C. 841(b)(4), same penalty as 21 U.S.C. 844, **supra.**

26/ In the Pet. Cert. 18 the Government suggested this case would offer guidance on the "compound-predicate" offense of using or carrying a firearm "during the commission of any felony." 18 U.S.C. 924(c). If the defendant were acquitted of a narcotics offense it seems impossible to believe that the jury verdict for carrying the weapon during the commission of the narcotics offense could still stand. Section 924(c) expressly provides the penalty shall be "in addition to the punishment provided for the commission of such felony." When used as ancillary offense, if the main offense fails, so does it. The telephone count may be used alone or as ancillary offense, but if used as ancillary offense as in the instant case, a "not guilty" on the predicate offense precludes conviction of the dependent offense.

450 U.S. 333 (1981), when Congress created two separate statutes with different requirements of proof, multiple punishments were permissible.

The Congressional requirement of a "felony" must not be overlooked. The act or acts constituting the predicate offense must equal a **felony**. The felony must be designated[27] and satisfy the requirements of proof -- proof beyond a reasonable doubt.[28] This is the predicate uniquely required for a Section 843(b) offense.[29]

The respondent's charges are more complex than required because they went beyond the statutory requirement of a

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27/ See Argument III, infra.

28/ See Argument II, infra.

29/ In construing the ambiguity inherent in the term felony in the context of this section, the "rule of lenity" should apply to resolve such ambiguity in favor of the respondent. Albernaz v. United States, 450 U.S. 333, 342 (1981).

single "felony." In each telephone count the prosecution named two separate felonies under this subchapter: "conspiracy to possess with intent to distribute and possession with intent to distribute."[30]

C. Unanimous Agreement of Courts of Appeals.

Since the jury returned a verdict of not guilty both as to the cocaine conspiracy and substantive count, the essential predicates were absent for a conviction on the section 843(b) count. The courts of appeals which have ruled on this issue have been unanimous in holding that when the conspiracy or substantive offense

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30/ This "inconsistency" between designating a "controlled substance offense" and then naming two specific felony violations was noted by the Court of Appeals (Pet. Cert. 8a). That the cocaine conspiracy count was the specific predicate of the four telephone counts could not be doubted in light of their specific ordered inclusion as the first named four overt acts. The court's instructions as to the substantive cocaine count were broad enough to make it the alternate predicate offense for each telephone count.

is targeted in the same indictment, if there is a failure of proof of the felony, the telephone count will also fail.

United States v. Hannah, 584 F.2d 27 (3rd Cir. 1978), is a leading case.[31] There the Government's trial theory was that in the telephone count the defendant facilitated the conspiracy in Count One. The court held:

> As has been previously observed, because of the interdependent Count III-Count I theory presented by the government at trial, we cannot conclude that "[e]ach count in [this] indictment is regarded as if it was a separate indictment." An appellate court may properly review a criminal case on the government's appeal only on the theory submitted to the jury at trial by the prosecution. In Dunn [v. United States, 284 U.S. 390 (1932)], [United States v.] Headley [, 468 F.2d 842 (3d Cir. 1972)], and [United States v.] Vastine [, 363 F.2d 853 (3d Cir. 1966)], the several counts each constituted a discrete offense. This case, however, was presented to the jury on a very limited basis: that the "acts constituting a felony" under section 843(b) in Count III were the very same acts that constituted the conspiracy alleged in Count I. Because the jury found Hannah not guilty of conspiracy, the felony relied upon by the government to satisfy the felony requirement of section 843(b), the government's case in Count III was insufficient as a matter of law. Accordingly, we will not apply the permissible inconsistent verdict rule to reinstate Hannah's conviction.

The trial judge in **Hannah** stated that the predicate conspiracy was in Count I, but Count I charging the respondent in the cocaine conspiracy expressly enumerated the telephone counts and advertised the conspiracy as the predicate offense.[32] In respondent's case during jury instructions on the conspiracy, the trial judge stated that an "innocent" overt act could be "using a telephone" (R.T. 1292). The

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31/ **Hannah** also held that a conspiracy or an attempt could be the predicate offense for section 843(b) contrary to **United States v. Leslie**, 411 F.Supp. 215 (D. Del. 1976).

32/ The jury had a copy of the indictment for their consideration during deliberations (R.T. 1290).

prosecution characterized the respondent's role in the conspiracy as the "secretary" -- "She takes messages. She relays messages" (R.T. 1279) and as a "small-time participant" who "assists" (R.T. 1184, 1188, 1191, 1193, 1208).

Only two types of evidence connected her with the conspiracy (or the substantive count) -- the cocaine and quaaludes found in the trunk of the Lincoln she was driving, and the telephone conversations. Must the jury's finding that she did not have the requisite knowledge for conviction of any conspiracy or substantive count be rejected? In the unique circumstances of this case where the pleading and evidence make such offenses interdependent, the court must implement the jury's finding that the predicate was not established. Therefore, the telephone count, which lacks an essential element, must fail.

The Government unsuccessfully contended there were conspiracies other than outlined in Count One. The Court in **Hannah** responded:

> "It cannot argue one theory before a jury at trial, to-wit, that proof of Count I was sufficient for conviction under Count III if a telephone was used, and the upon appeal, in a period of post-trial reflection, suggest that other conspiracies, not included in Count One, could support a conviction under Count Three." 584 F.2d 27, 29.[33]

The **Hannah** decision is a "rare case" exception to the permissibility of inconsistent verdicts because it involves the unusual occurrence of one charged count existing as the element of another. When that element (predicate) fails, so also the other.[34] As was stated in **United States v. Brooks**, 703 F.2d 1273 (11th Cir. 1983):

33/ The Government made the same argument in the instant case in the petition for rehearing, which was rejected by the Court of Appeals. (Pet. Cert. 7a).

34/ See **United States v. Uzzolino**, 651 F.2d 207, 213 (3rd Cir. 1981).

Where an indictment charges a specific conspiracy in one count and in a separate count charges a section 843(b) violation in furtherance of that same conspiracy, the permissible inconsistent verdict rule, Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L.Ed. 356 (1932), cannot operate to sustain a conviction for a section 843(b) violation if the defendant is acquitted of the underlying conspiracy.

The Court followed **Hannah** but recognized the result as a "unique situation": "[W]e agree that the (inconsistent verdict) rule should not be applied in this limited fact situation. 703 F.2d 1273, 1278.[35]

D. **Inconsistent Verdicts and the Dunn Rule.**

The result in **Dunn v. United States**, 284 U.S. 390 (1932), is easy to understand as the Court's reluctance to give a misdemeanor defendant a "double

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35/ In **United States v. Bernardi**, 675 F.2d 894, 901 n. 15 (7th Cir. 1982), this circuit court acknowledged the **Hannah** exception but noted it was limited to its circumstances.

benefit" from an obvious act of jury leniency to the since-repealed Prohibition Act.

Dunn was charged with three discrete offenses: (1) maintaining a common nuisance by keeping for sale at his establishment liquor, (2) unlawful possession of liquor and (3) unlawful sale of liquor. Two undercover prohibition agents and two unknown men entered Dunn's establishment and ordered, obtained, and paid for four alcoholic drinks. They ordered seconds and paid for them. Dunn testified he was elsewhere. Dunn was convicted on the first count and acquitted on the remaining two. The sufficiency of the evidence was not challenged, but the inconsistent jury verdicts were appealed. Justice Holmes, in his venerable and pithy style, stated for the court: "Consistency in the verdict is not necessary." 284 U.S. 390, 393.

The Government contends the differently worded misdemeanor ordinances in Dunn offer a parallel for the compound-predicate offense issue. (Govt. Br. 22-24). The Government answered its own argument in Dunn by showing it was possible that the verdicts were not necessarily inconsistent:

> [F]or some third person, with defendant's knowledge, may have been doing business on the premises, and if so they were a nuisance, and the defendant was guilty although he neither possessed nor sold intoxicating liquors upon them; that whereas the Government's witnesses may have been mistaken in saying that the defendant sold, they may have been right to the extent that someone did, and if that be true the defendant's knowledge could be inferred, this being his place of business and he being habitually present there. It is further argued that it may be inferred that he received the money coming from the sale, and that he knowingly abetted the seller in the acts that created the nuisance on the premises that the defendant controlled. 284 U.S. 390, 393.

The court conducted no analysis of the three sections, and reliance on the

dissent's evaluation (Justice Butler) is not binding precedent.

In United States v. Dotterweich, 320 U.S. 277 (1943), the Court restated the Dunn rule that whether the jury's verdict was the result of carelessness or compromise was immaterial. However, there the jury acquitted the corporation but convicted its president and general manager. The corporation's guilt was not the predicate of the president's guilt.

In Bartzel v. United States, 322 U.S. 680, 682 n. 3 (1944), the Court acknowledged that a single person could not be convicted of a conspiracy that by definition required an agreement or combination

of two or more persons.[36] The legal definition of conspiracy required the result. The district court and appellate court which discharged the other alleged co-conspirators because of legal considerations as to requisite proof, not dissimilar to the factual considerations which are the paramount focus of the jury, created this "inconsistent" result.

If there were no judicial review of elements of the offense, every jury verdict would have to be sustained without

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36/ "Petitioner's co-defendants — Macartney, an attorney, and Soller, the mimeographer — were found guilty on counts 5, 6, and 7. But the trial judge set aside Macartney's conviction on a motion for a new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Soller's conviction was set aside by the court below on the ground that there was no proof that he knew what use petitioner made of the pamphlets. Macartney and Soller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count."

the application of the rules of the law. Certainly the inconsistent verdict doctrine should not be pushed to illogical extremes. The jury's discretionary power to "check" the Government, a shield for the accused, did not put the jury "above the law" when a conviction resulted.[37] The jury's power should not be construed as a shield to prevent legal review. Scrutiny of a jury's verdict against the statutory definition of the offense is still required.[38]

37/ "Under such a system, the principal function of the judge would be to preside and keep order while jury-men, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as in their judgment were applicable to the particular case being tried." Sparf v. United States, 156 U.S. 51, 101 (1895).

38/ The Hartzel opinion does not refer to the Government's concession (Govt. Br. 24 n.31) as the basis for its holding, and apparently the Government now thinks its original position was wrong. As the Government points out, the question of the validity of the conviction of a single conspirator is not before this Court.

In Hamling v. United States, 418 U.S. 87, 100-101 (1974), the defendants were convicted of obscene mailings of a brochure describing an Illustrated Presidential Report on pornography, but the jury was unable to agree as to a verdict on the counts referring to the Report. Because the Report was not adjudged obscene, the defendants contended that the brochure must be presumed non-obscene. This argument was rejected by the court of appeals and this Court, because "[t]he premise is false. The jury made no finding on the charged obscenity of the Report."

The jurors did not acquit Hamling, but they did respondent. Hamling does not foreclose the relief granted by the Court of Appeals on the telephone counts when the jury acquitted both as to the two conspiracies (cocaine and quaaludes) and the matching substantive counts.

Standefer v. United States, 447 U.S. 10 (1980), held that a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense. The principal, an Internal Revenue Service auditor, was charged with accepting improper compensation, free vacation trips, and Standefer was charged separately with aiding and abetting him. The principal was acquitted of those particular counts, but Standefer in a later jury trial was convicted of aiding and abetting (18 U.S.C. 2).

This court extensively reviewed the common law rule which would have precluded prosecution of Standefer after the principal was acquitted. This Court held that Congress, in adopting 18 U.S.C. 2, rejected the common law rule and permitted such prosecutions. 447 U.S. 10, 18-20. Because Standefer was not tried with the

principal and the Government would not have the opportunity to introduce all their evidence against him he could not assert the doctrine of nonmutual estoppel against the Government. The Court also noted that different juries can produce different results.

Respondent was tried by the same jury which acquitted her of the predicate offense. Although not charged as an aider and abettor, the jury was instructed they could convict her for aiding and abetting (R.T. 1296) and they still acquitted her of the conspiracy and substantive counts. Standefer is thus distinguishable from this case.

Harris v. Rivera, 454 U.S. 339 (1981), is also distinguishable because it is federal habeas corpus review of a state criminal conviction, while this case arises out of direct appellate review of a

federal criminal case.[39] This court did not require consistent verdicts in a non-jury criminal trial in which the sufficiency of the evidence was not at issue. The state defendant had no constitutional ground to complain that his co-defendant was acquitted.

Dunn and its progeny provide no similar fact pattern to guide us. The Government contends that there are no exceptions to Dunn.[40] Are there any limits to Dunn?

E. Res Judicata.

In Dunn, this court stated, "an acquittal on one could not be pleaded as res judicata of the other." 284 U.S. 390,

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39/ "This case does not raise any questions concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal." 454 U.S. 339, 343; 102 S. Ct. 460, 463.

40/ "This court has never recognized any exception to the Dunn rule." (Govt. Br. 24, n. 31)

393. This obiter dicta has to be qualified in light of both prior and subsequent precedent.[41] In United States v. Oppenheimer, 242 U.S. 85, 88 (1916), Justice Holmes, quoting Judge Hawkins, stated:

> Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication whether it takes the form of an acquittal or conviction is final as to the matter so adjudicated upon, and may pleaded in bar to any subsequent prosecution for the same offense.... In this respect criminal law is in unison with that which prevails in civil proceedings.

41/ See also United States v. Adams, 281 U.S. 202, 204 (1930); Emich Motors v. General Motors, 340 U.S. 558, 568 (1951). More recently the doctrine has been called collateral estoppel. "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970).

But an acquittal does not necessarily preclude a readjudication in a civil proceeding. United States v. One Assortment of 89 Firearms 104 S. Ct. 1099 (1984) (acquittal does not preclude forfeiture).

Dunn must be balanced by Sealfon v. United States, 332 U.S. 575 (1948).[42] In Sealfon two indictments were returned against the same defendant, one charging a conspiracy to defraud and the other a substantive count. The conspiracy charge was tried first, and the defendant acquitted. Trial on the second indictment substantially adduced the same evidence, and the defendant was found guilty. Former jeopardy did not attach, because the offenses were different, but the Court reversed because of the doctrine of res judicata. This Court did not apply an automatic bar, but stated: "The instructions under which the verdict was rendered, however, must be

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42/ For a short comment on the conflict between Dunn and Sealfon see Bickel, "Judge and Jury - Inconsistent Verdicts in the Federal Courts," 63 Harv. L. Rev. 649, 650-654 (1950). Bickel overstated his case by stating Sealfon may have sub silentio overruled Dunn. Dunn as a general principle and in its particular factual context is not challenged here. There are exceptions to Dunn and respondent's case is one of them.

set in a practical frame and viewed with an eye to all the circumstances of the proceedings." 332 U.S. 575, 579.

Respondent's case differs in that Sealfon had two trials. Prior to Sealfon's first trial, all charges had been returned.[43] The telephone counts respondent was charged with included a cocaine conspiracy and substantive conspiracy as predicates. She was also charged with these offenses and acquitted of both. The evidence was the same as to all offenses -- the telephone counts were expressly incorporated into the cocaine conspiracy count. The prosecutor presented this case on the same evidence, the judge instructed on the interrelationship of the counts, and the

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43/ Severance of the trials under the broad almost unfettered discretion of a federal trial judge (F.R.Cr.P. 8, 14) should not be the difference in the application of the rule.

defense responded based on this understanding.

Against the "practical framework" of this case, the doctrine of collateral estoppel or res judicata should apply. This rudimentary principle of law should be mutual -- not only work against an accused but work for him as well.[44]

II

The Court of Appeals Finding of Insufficient Evidence to Support the Telephone Counts Should Not be Overturned

A. Court of Appeals Finding of Insufficiency.

The Court of Appeals opinion, authored by Senior Circuit Judge Chambers, repeatedly used the term "insufficiency," an established word of art in appellate

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44/ Allen v. McCurry, 449 U.S. 90 (1980) (when state criminal court denies motion to suppress evidence defendant is collaterally estopped from bringing a federal civil rights action for unlawful search and seizure).

courts.[45] The opinion states:

> We have reviewed the record and we are not convinced that there is evidence to support the government's claim that 'someone other than' the conspirators named in Count One had possession and that appellant's telephone calls facilitated that possession. Thus, on the facts of this case, we must reverse the conviction as to Counts Three, Four, and Five. (Pet. Cert. 2a) (Emphasis Added.)

The Court of Appeals then cited United States v. Bailey[46], 607 F.2d 237, 245 (9th Cir. 1979), prior to the citation of Hannah, supra, (Pet. Cert. 2a). In Bailey, the telephone conversations proved the defendant was a purchaser but was not

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45/ "A reversal based on the insufficiency of evidence has the same effect (as an acquittal) because it means no rational factfinder could have voted to convict the defendant." Tibbs v. Florida, 102 S.Ct. 2211, 2218 (1982) (a reversal on insufficiency is different than one based on the weight of the evidence).

46/ Contrary to the Government's contention that the Court of Appeals was "confused" by its reliance on Bailey "which involved a conventional challenge to the adequacy of the government's proof" (Govt. Br. 20 n. 25), the use of Bailey demonstrates that the court meant insufficiency when it said "insufficient evidence."

shown to be connected with the overall conspiracy. In Bailey the court held:

> Guilt remains individual and personal, however, even in conspiracy prosecutions, and a conviction must rest upon individual guilt beyond a reasonable doubt, not mass guilt.

In Bailey the court overturned the jury's verdict of guilt on the conspiracy and telephone counts with greater evidence than exists against the respondent. The federal court of appeals in exercising its plenary review of a criminal conviction found the evidence in this case lacking. The reviewing court provided alternative grounds for the reversals and adequately expressed its finding of insufficiency of evidence. Indeed, on the denial of the Government's petition for rehearing, it concluded:

> We adhere to our statement in our opinion that there is insufficient evidence to support the conviction on Counts Three, Four, and Five. (Pet. Cert. 8a) (Emphasis added).

B. Suspicion But Not Proof of Guilt.

In the face of the appellate finding of insufficiency, the Government contends here that the evidence was sufficient (Govt. Br. 18, 19, 20, 22). It speculates that the acquittal of 11 counts was merely an act of leniency by the jury. The detail of the facts in the Government's Brief (4-9) includes evidence in support of the charges for which the respondent was acquitted (i.e., assault on the FBI agents, conspiracy and possession of controlled substances, and possession of silencers and machine guns in the trunk of her car). The Government's synopsis of the record does not do justice to the Court of Appeals finding of insufficiency of evidence. The Government cannot be permitted here to reargue its lost cause on the facts. This is the wrong forum for the resolution of factual issues. The jury resolved those issues long ago.

The Government had 23 days of electronic surveillance and at trial introduced 83 tapes in support of its case against the respondent. The Government's claim that the respondent "knew what was going on"[47] omits the rest of defense counsel's statement: "knowledge and presence at the scene is not enough. You have to willfully have to have the specific intent. You have to be aware of what you are doing and the extent of what you are doing" (R.T. 1265). The prosecutor conceded under his theory of the case that respondent was "not the heavy *** [but rather a] small-time participant in a major narcotics organization" (R.T. 1208). The defense did not stipulate to her small-time characterization as a secretary, but directly challenged the proof of her guilt.

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[47]/ Partial quote of defense counsel's closing argument twice cited as support for sufficiency of the evidence. Govt. Brief 4, 18.

Respondent, chained to the household by the responsibility for a 10-year-old son, may have understood the nature of her husband's unlawful activity, but there is no proof of her knowing participation in his "business." In fact, on one occasion she threw out her son's dope because she did not know what it was. She was constantly berated by both her husband and son, and their treatment of her is inconsistent of a voluntary participant.

Although respondent does not believe certiorari was granted in this case to review the Ninth Circuit's view of the sufficiency of the evidence on counts 3, 4, and 6, such review is required if the reversal of those counts is to be disturbed. Therefore, respondent must plunge into the facts to demonstrate the correctness of the Ninth Circuit's assessment.

1. Call to the Thin Man. (11 April 1982; Counts 3 and 4).

At 8:02 p.m. Jeff calls his mother from the L.A. airport, notes his father's delayed arrival, and then talks about the Easter gifts, flowers and a bunny rabbit, given to respondent and Jeff's sister Lindley. Respondent states to Jeff that Sam never called. Jeff asks her to call the "Thin Man," Sandy Segal, so named because he is so fat. Jeff also asked respondent to ask him to bring over the "coupons."[48]

Common irony should not be treated as a sinister "code." For the Government, use of the code word "coupon" is the talisman of guilt. "Coupon" was used by Ron and

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48/ The Government's Brief states, "Respondent told him that Sam Spinello, who still owed money for drug purchase, had not called." (Govt. Br. 5). That is an accurate statement as to Jeff, but not as to the respondent. The attribution of Ron's and Jeff's knowledge and participation in the dope business to the respondent is a serious error in light of the acquittals.

Jeff regularly, and the same term was used by Ron to refer to the purchase of a house. Almost all families have their own vernacular or slang, and money has been referred to as "bills," "bucks," "coin," "loot," "green stuff," "hay," and innumerable other terms. A code[49] word implies secrecy or deception, but "coupons"[50] is obviously

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49/ Webster's Ninth New Collegiate Dictionary, 255 (1984) lists for the word "code": "a system of (words) used to represent assigned and often secret meanings." The conversations of Ron and Jeff included several obvious code words: "cuter," "jacket," "M.R.," but such words are absent in the taped conversations of the respondent.

50/ The historical definition of "coupon" is: 1868 Bartlett 95 In the United States, the certificates of State stocks drawing interest are accompanied by coupons, which are small tickets attached to the certificates. 1868 Treasury Dep. 488 Such coupon stock...may be assigned and transferred by the delivery of the certificates. 1882 Rettell Hist. Rebellion I. 229 The bond ... has attached to it small bonds, one for each six months interest until the maturity of the bond itself. The holder cuts off the one due, and presents it forf payment. These are called 'coupons' from the French couper, to cut. 1900 S.A. Nelson ABC Wall St. 137 Coupon ... In Wall Street they are understood to be the obligations for interest on bonds, and are a printed part of the bond." II A Dictionary of American English 652 (Univ. Chi. 1976).

related to instruments of wealth or finance and clearly connotes money. The respondent denied knowing the Thin Man, "because I don't talk in code" (R.T. 1042), but she did acknowledge that she knew Sandy Segal (R.T. 1052). The words used, in context, presented a reluctant exploited conduit who the jury found not to have knowingly participated in her husband's drug business.

At 8:10 p.m. respondent called Sandy Segal and asked if Sam had visited him. She stated Ron wants all "the money" home tonight, but instead of claiming knowledge of the purpose of the money referred to "the arrangement Sam made." Context is critical. The respondent wanted to take her 10-year-old son "Mike out for a brunch and an Easter egg hunt," but the respondent had been directed to wait for Sam, a person she disliked. Her statement about people who wanted her to do something about "doing things around her" was an understandable

negative reaction to her conduct being directed by others (Ron and Jeff).

In her household where the man and boy were supreme, she followed orders. Their low opinion of her did not require that they explain their actions to her. Her response was not a manifestation of a readiness to be involved with dope but rather disgust at the last minute assignment of this menial and unpleasant task by her husband and son.

The remainder to the conversation bears out her lack of knowledge in discussing an Easter drive to Julian, the ruined stereo, and the theft of her car from a department store lot. Near the end of the conversation Sandy abruptly refocuses the conversation on the "coupons," and she relays that Ron knows that Sam told him (Sandy) something. Sam had stated the respondent "should have some say." Unaware of the phone monitoring, the respondent

answered in a manner which reflected her lack of participation -- "This ain't my business, you know. Ain't my movie."

2. Call about the package. 16 April 1982: Count 61.

Jeff calls respondent at work and tells her she must come home right away because Ron and Jeff are going to the ball game. The respondent expects to go look at a house Ron planned to buy. Jeff gets off the line, and the first thing Ron mentions to the respondent is the house. Ron had looked at others which he didn't like except for one, and he tells her that the information sheet on that house will be left on the bed. In an interspersed and isolated comment in this protracted discussion about looking for a house, Ron parenthetically mentions leaving the package for Sam on the bed. The remark immediately follows the reference about leaving the information sheet about the house on

the bed. Respondent was centrally, if not exclusively, interested in the house. Allowing Sam to pick up the package[51] while she was there demonstrates no knowledge of its contents[52] or involvement in a conspir-

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51/ Jeff's discussion with Sam and reference to a "jacket" or "cuter" code names for cocaine, and Ron's record book showing a sale of a quarter ounce to Sam Spindle is the only evidence of what was probably in the packet. No evidence was adduced that the packet contained quaaludes.

52/ Over defense objection (R.T. 1107) the trial judge gave the United States v. Jewell, 532 F.2d 697 (9th Cir. en banc) 426 U.S. 951 (1976) instruction: "Although the defendant was not actually aware that there was a controlled substance in her vehicle at the time of her arrest, she nevertheless was aware of a high probability that the vehicle contained a controlled substance and that her ignorance of the presence of the controlled substance was solely and entirely a result of her having made a conscious effort to disregard the nature of that which was in the vehicle with a conscious purpose to avoid learning the truth." (R.T. 1313) No evidence was presented that respondent consciously avoided learning of the contents of the trunk, and the giving of that instruction was error. United States v. Garzon, 688 F.2d 607 (9th Cir. 1982); United States v. Beckett, 724 F.2d 855 (9th Cir. 1984). The "package" in the jury's note could have possibly referred to the packages in the car trunk. The impact of the instruction would also carry over to the jury's consideration of the type of knowledge necessary with referfence to the package picked up by Sam.

acy. In a monitored conversation, Jeff had earlier noted that she threw out some "black stuff," because she did not know what it was.

Both Jeff and the respondent testified she was unaware of the presence of dope and was not involved in that business. The jury's note concerning the contents of this package (see pp. 25-26, supra) does not square with the evidence but is more likely an acquiesence to the respondent's trial defense counsel's concession: "How can you conclude from these conversations that it's (money is) for one or the other? It could have been for dope, but was it cocaine or quaaludes"[53] (R.T. 1262). The statement

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53/ The money from Sam (Counts 3 and 4) and the package for Sam (Count 5) were probably equated by the jury. The jury note referred to "the package," and the jury convicted on those three counts involving Sam Spindle. See note 16, supra.

of defense counsel was not evidence,[54] yet without it there would have been no dope related conviction of respondent. It was not the strength of the Government's case that prevailed, but rather the failure of defense.

3. Other Evidence.

The sins of the husband and son should not be visited on the respondent, who as the mother of her 10-year-old son, had to make a home for him. That she lived with them did not mean she shared in their illegal business. She worked, her husband did not. Ron and Jeff issued orders to her, and she felt obliged to comply. When dope was involved, she refused to participate. The respondent was faced with the dilemma of living with Ron and Jeff or trying to make it by herself with

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54/ The trial judge instructed the jury: "Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact." (R.T. 1287).

Mike. She had left Ron in the past, but she returned because she loved him. That she remained despite her awareness of his dope dealings does not equal guilt.[55] Her acquittals stand as jury rejections of the Government's claim that the respondent knew the contents of the car trunk or that her departure from the "gentlemen" (FBI in common dress) was consciousness of guilt instead of fear of the unidentified agents.

When the jury found on the evidence against the Government, it was not an act of lenity, compromise, mistake, or arbitrariness[56]. It was lack of proof

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55/ The trial court instructed that mere presence and knowledge were not sufficient, and the evidence at best proved that respondent was not more than a "knowing spectator" (R.T. 1290).

56/ The Government's assumption of adequate evidence is necessary to explain an "irrational" result by the jury. There is something inherently wrong with the Government's use of facts rejected by a jury as "proof" of predicate offenses to support Counts 3, 4, and 6.

beyond a reasonable doubt. Jackson v. Virginia, 443, U.S. 307, 317 (1979).

C. Dunn's Requirement of Sufficient Evidence.

If the proof is insufficient it is meaningless to talk of inconsistent verdicts. In Dunn where the evidence as to all three charges was sufficient, the Court found that the finding of guilty on a single count was an act of lenity. But there the evidence of guilt was overwhelming, and the jury could easily have compromised because of the unpopular prohibition laws.

In United States v. Butterworth, 320 U.S. 277, 278 (1943), the court reaffirmed the finding of the court of appeals that the evidence was adequate to support the verdict. In Standefer v. United States, 447 U.S. 10, 26 (1980), the defendant received a fair trial and Government bore its burden of proof beyond a reasonable doubt. In Harris v. Rivera, 454 U.S. 339 (1981), the Court noted: "[A]ll agreed that the record contains adequate evidence of guilt." 454 U.S. 339, 348.

D. Arias Variation = Uncharged Predicate Offenses.

The "act or acts constituting a felony" in 21 U.SC. 843(b) must be identifiable.[57] Here this requirement may be satisfied if the "felony" to which these three telephone counts refer is the cocaine conspiracy in Count One or the substantive count in Count Nine.

In United States v. Arias, 639 F.2d 1183 (5th Cir. 1981), the defendant was found not guilty of a conspiracy but guilty of the telephone count. The court distinguished United States v. Hannah:

> First, the Government offered DEA agent as a witness who testified that, in his two taped telephone conversations with Arias, Arias indicated that he had several sources

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57/ See argument on vagueness, III A. infra

> for cocaine other than his co-defendants. Moreover, the record does not support Arias' allegation that the government prosecuted him on the theory that, in order for the jury to find Arias guilty of the substantive counts involving use of the telephone, the jury would have had to have been convinced that Arias' use of the telephone facilitated the conspiracy charged in Count I. 639 F.2d 1183, 1185.

The Ninth Circuit referred to and acknowledged *Arias*, but held that the prosecution's theory and closing argument and the court's instructions focused on the alleged conspiracies and other substantive counts of which respondent was acquitted. (Pet. Cert. 7a). In concluding the denial of the petition for rehearing the court below stated:

> On this record we are not willing to presume, as the government would have us do, that the jurors must have intended to find appellant guilty of having facilitated someone's possession of cocaine, apart from the conspiracy of which she was acquitted (Counts 1) and apart from the possession of which she was acquitted (Counts 9). All of the telephone conversations that the government put into evidence were

> offered for the purpose of establishing "the scope and course of the conspiracy." (R.T. 270). (Pet Cert. 8a)

The Ninth Circuit accepted the *Arias* variation, but found the Government did not make an adequate factual showing for its application.

III

The Three Telephone Counts Failed to State an Offense and Failed to Give Adequate Notice to the Respondent of That Which She was Charged[58]

A. Lack of Proper Notice of Nature of the Charge.

Each of the telephone counts states a double predicate even though the language of the charge used a singular "offense."[59] Although the date and time of

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[58]/ Although Rule 12(b)(2) Fed.R.Crim.Proc. would preclude the challenge on the grounds of duplicity (naming two different predicate offenses), the failure to charge an offense may be noticed "at any time during the pendency of the proceedings." This court may also consider plain error. Fed.R.Crim.P 52(b); Sup. Ct. Rule 34.1(a).

[59]/ The Court of Appeals noted this "unfortunate" drafting. (Pet. Cert. 8a).

the telephone communication are made, the essential element of the offense is the felony which is "facilitated." To give minimal notice to adequately prepare a defense, the predicate offense should at least give the person or persons involved, date, and place where it occurred.

The notice requirement of sufficiency for a federal criminal charge is set forth in **Russell v. United States**, 369 U.S. 749, 763-4 (1962):

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged," '**and sufficiently**' **apprises the defendant of what he must be prepared to meet**" and secondly, "in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (Emphasis added).

Although the language in 21 U.S.C. 843(b) refers to "act or acts" the language of the statute clearly limits itself to a single felony ("constituting a

felony"). The confusion can be seen in the context of this case where under the present form of the pleading, the Government could readily argue that it is referring to an unlimited number of cocaine conspiracies and substantive offenses not otherwise charged. This effectively prevents any form of notice as to predicate offense.

Here, the date and time of the communication listed in the indictment, do not adequately supply notice of the essence of the offense -- the predicate.

If the Government can successfully argue, even at the appellate level, that other predicates were possible when it argued at trial that respondent's predicate offenses were as charged in the conspiracy counts -- this Court gives approval to deliberately deceptive pleading. A charge so framed does not give fair notice of the nature of the offense and apprise him "of what he must be prepared to meet."

9. Fatal Variance Between Indictment and Proof.

The trial judge instructed that the jury could convict on the telephone counts if the proof showed other cocaine or quaaludes were in the package (see p. 27, supra), but the indictment charged telephone counts with predicate cocaine offenses.[60]

When the jury was instructed that they had to find a controlled substance specified in the indictment (Counts One, Two, Nine and Ten), they returned a verdict of not guilty. The issue was critical in this case, for the jury specifically

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60/ Defense counsel requested that they be advised of the specific nature of the substance charged in the telephone count, but when the court decided to give the instruction concerning either quaaludes or cocaine he did not "quarrel" with that statement of the law. This failure to quarrel with the judge should not be treated as a voluntary waiver of the objection.

requested advice about the contents of the "package."[61] This departure from the indictment was unwarranted.

In Stirone v. United States, 361 U.S. 212 (1960), the defendant was charged with a Hobbs Act violation by interstate importation of sand, but a jury instruction permitted a finding of guilty also on interstate exportation of steel.

The Court, citing Ex Parte Bain, 121 U.S. 1, 10 (1887) held,

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what ought to have been, or what the grand jury would probably have made if their attention had been called to suggested changes, the importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer,"

61/ Apparently a reference to the package that Sam picked up, and about which the FBI agent stated he couldn't determine from the conversation whether it was a reference to either cocaine or quaaludes.

maybe [illegible] away until its value is almost destroyed. 361 U.S. 212, 216.

The Court in **Stirone** held that trial court had not permitted a formal amendment of the indictment but the effect was just the same. This variation between pleading and proof destroyed the defendant's right to be tried only on charges presented in an indictment returned by the grand jury. 361 U.S. 212, 217.[62]

In this case, the variation was critical because it destroyed any specificity left in identifying the predicate offense of the telephone counts. Also, there was no direct evidence of the substance in the "package" picked up by Sam. But inferences from the telephone conversations were that it may have been cocaine.

62/ "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." Jackson v. Virginia, 443 U.S. 307, 314 (1979).

There was no evidence that it contained quaaludes. Since the trial jury was at "impasse" over the nature of the substance, the "either or" option permitted a verdict on the quaaludes.[63]

This court has held, "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground but not on the other, and it is impossible to tell which ground the jury selected." **Yates v. United States**, 354 U.S. 309, 312 (1957).

63/ In **United States v. Lopez Martinez**, 725 F.2d 471 (9th Cir. 1984), the three-judge panel held that on an indictment charging heroin proof of marijuana was permissible and distinguished **Stirone**. The same panel had earlier reversed because of the **Stirone** error, but that opinion was withdrawn. 712 F.2d 1329 (9th Cir. 1983).

IV

The Trial Proceedings in Which the Respondent Was Represented by Incompetent Counsel With a Patent Conflict of Interest Were Not Fairly Conducted

A. Conflict of Interest

Mr. Prantil also represented Jeff, respondent's son who was subject to a juvenile adjudication. The district judge secured a waiver from the respondent about a potential conflict of interest between her and her son. No inquiry was made about a waiver of the conflict of interest between her and her fugitive husband.[64] Mr. Prantil at respondent's sentencing admitted that he had carried letters from the fugitive husband to the confined respondent (R.T. 1432).

The respondent's assets had been seized, and she had been unsuccessful in her attempt to obtain appointed counsel.

64/ See Rule 44(c) inquiry transcript of 17 May 1982, a part of the record on appeal.

The bank account which was the basis of the false statement on the application for appointed counsel was transferred to Prantil as attorney fees (R.T. 1079). This account was frozen and the subject of a forfeiture proceeding.[65]

In April 1983 criminal charges were filed against Prantil which spell out in detail a sordid conspiracy with Ron Powell to possess with intent to distribute cocaine, his perjury before the grand jury, the false presentation of a surety bond, and false declarations in respondent's case concerning money held for the fugitive husband. (See Brief Opp. App. A). He was convicted after jury trial, and in January

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65/ A copy of the Complaint for Forfeiture of this bank account is filed as Appendix F to the Petition for Writ of Certiorari entitled Betty Lou Powell v. United States, S. Ct. No. 83-6617 cert. den. 18 June 1984. The court is requested to take judicial notice of this document. Federal Rule of Evidence 201(f).

1984 was sentenced to four years confinement (See Brief Opp. App. B). He is now on bond pending appeal. In short, the charges and conviction of Prantil established that he was a criminal conspirator with Ron Powell at the very time he represented respondent.

Once a conflict of interest has been established, no prejudice need be shown to justify a reversal. Glasser v. United States, 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978). The ABA Model Rules of Professional Conduct require that a lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless each client consents after consultation. Model Rule 1.7(a).[66] Here, the receipt of money from the fugitive husband and in-

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[66]/ The Model Rules of Professional Conduct were adopted by the ABA House of Delegates on 2 August 1983.

volvement with him since the date of respondent's arrest demonstrates beyond dispute that a valid consent was not and could not be taken from the respondent. The trial court could not inquire about what it did not know. Trial counsel's conduct is aggravated because he not surprisingly remained quiet about his own criminal involvement with the fugitive husband, respondent's alleged co-conspirator.

There is no showing that the conduct of this attorney was not influenced by the more affluent fugitive husband who may have paid and even directed the conduct of this case so as to protect himself.[67]

The instant case is similar to but more aggravated than Wood v. Georgia.

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[67]/ See ABA Model Rules of Professional Conduct, Rule 5.4(c), "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

450 U.S. 261 (1981), where this Court granted relief because of the potential conflict the attorney had between his client and an employer who paid attorney fees and was involved in the criminal activity. The Court stated: "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." 450 U.S. 261, 271.[68]

In Wood, this Court was concerned with the adequacy and loyalty of the attorney at the time of sentencing and revocation of probation. In the respondent's case the serious potential for divided or

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[68]/ The concurring opinion of Justice Stevens could be paraphrased so as to fit this case: "The net result of the conflicting interest represented by one lawyer is a manifestly unfair [trial] imposed on [the wife] of the person who is probably the principal wrongdoer." 450 U.S. 261, 274.

subordinated loyalty permeated the entire criminal proceedings. For example, Prantil in responding to the prosecutor's remark at sentencing referred to a statement of the prosecutor at an early stage of respondent's case : "What can you give me, and I will cut you loose?" (R.T. 1423). The clear implication is that if the respondent individually and voluntarily chose to cooperate with the Government concerning the involvement of others or possibly the whereabouts of her husband, the charges against her may have been dismissed. That option could only have been exercised with the guiding hand of counsel totally loyal to herself and not committed to criminal activity with the fugitive husband.

Because of the serious proven criminal misconduct of Prantil with a fugitive co-conspirator while simultaneously representing respondent at all phases of

jury trial, this Court should follow the procedure in Wood and remand to the Court of Appeals for a further remand to the district court to determine the nature of the conflict and grant appropriate relief.

B. Disloyalty and Ineffective Assistance of Counsel.

Trial defense counsel, Prantil, made a concession during closing argument contrary to the respondent's testimony that the "package" or the "money" owed by Sam Spindle "could have been for dope, but was it cocaine or was it quaaludes?"[69] (See pp. 26 n. 16; R.T. 1262). Defense counsel without authority conceded the critical issue: respondent's knowledge of the controlled substance. This concession was worse than incompetence; it was disloyalty.

69/ Although this specific reference was not used, the issue of ineffective assistance of counsel was raised in and reviewed by the Court of Appeals.

Counsel ceased to act as an advocate for his client and denied her the representation in a serious federal criminal case to which she was entitled.[70] Anders v. California, 386 U.S. 738, 744 (1967); United States v. Cronic, 104 S. Ct. 2039, 2045 (1984.

The jury fastened on this concession by Prantil, for their 6 July 1982 note (pp. 25-26, supra) stated: "Most of the jurors are sure the defendant knew there was either quaaludes or cocaine in the package" (R.T. 1372). This acted-on concession cannot be interpreted as a "tactical ploy or strategem" -- for it only hurt the respondent. The jury's reliance on this patent failure presents demonstrable and obvious prejudice. "[T]here had been an actual breakdown of the adversarial pro-

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70/ The disloyalty is aggravated by Prantil's on-going dope involvement with the fugitive husband.

cess during the trial of this case.[71] United States v. Cronic, 104 S.Ct. 2039, 2046 (1984).

V

The Respondent Did Not Consent In Writing After Re-indictiment To Waiver of the 30-day Defense Preparation Period Under the Speedy Trial Act

On 14 June 1982 the defendant was arraigned on the superseding indictment which served as the basis of her conviction. Counsel acknowledged receiving a copy of the superseding indictment. [Arr. R.T. 2)[72] Counsel indicated he was ready

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71/ The error of defense counsel Prantil, coupled with his proven criminal conduct with Ron during the trial when representing respondent is of such infectious magnitude that it should not be relegated to a future post-conviction remedy (28 U.S.C. 2255). This court has a special appellate responsibility when it grants review, and it cannot blind itself to such egregious misconduct of trial defense counsel that was the predicate of the jury's adverse verdict on the three telephone counts.

72/ "Arr. R.T." is the transcript of the arraignment. Counsel for respondent has lodged a copy of this transcript with this Court, because it was not a part of the record on appeal.

for arraignment on the superseding indictment which added the false statement count of which the respondent was convicted (Arr. R.T. 3-4). The next day defense counsel brought a motion to suppress evidence concerning the overbroad search warrant and the seizing of a savings account not described. (R.T. 5). The court denied the motion "on the ground that you uniquely urged this morning." (R.T. 6).

The 1969 amendments to the Speedy Trial Act provided for a 30-day preparation period prior to trial:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than 30 days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se. 18 U.S.C. 3161(c)(2).

In the Ninth Circuit the preparation period runs from indictment or rein-

dictment.[73] The respondent did not consent in writing and trial defense counsel's inept presentation of the motion to suppress on the day of trial manifests a professional unawareness of the mandated preparation period. The violation of this 1969 amendment to the Speedy Trial Act should first be reviewed by the Ninth Circuit,[74] and the case should be remanded for this purpose.[75]

73/ United States v. Arkus, 675 F.2d 245 (9th Cir. 1982); United States v. Daly, 716 F.2d 1499 (9th Cir. 1983); United States v. Harris, 724 F.2d 1452 (9th Cir. 1984). The First Circuit held that the 30-day period does not apply to re-indictment. United States v. Rush, ____ F.2d _____ (No. 83-1117, 1st Cir. 27 Jun 84).

74/ Appointed counsel obtained this transcript, and the potential Speedy Trial Act violation was raised in the Brief in Opposition (16 n. 15).

75/ The violation of the Congressional mandate that gives a personal right to the defendant that must be waived in writing is the basis of this claim rather than ineffective assistance of counsel. Cf. United States v. Cronic, 104 S. Ct. 2039 (1984) (25-days preparation adequate under Sixth Amendment).

CONCLUSION

This case presents a rare and infrequent exception involving 21 U.S.C. 843 that does not undermine the permissible inconsistent verdict doctrine of Dunn v. United States, 284 U.S. 390 (1931). The Court of Appeals decision on insufficiency of evidence must be respected.

Because of the proven criminal involvement of respondent's attorney with her alleged co-conspirator and the lack of waiver of the required 30-day defense preparation period, it is urged that this case be remanded to the Court of Appeals for consideration of those two issues. In the alternative, it is requested that the petition for writ of certiorari be dismissed as

improvidently granted or the judgment of the court of appeals be affirmed.

Respectfully submitted,

JOHN J. CLEARY
Attorney for Respondent
Betty Lou Powell

REPLY

BRIEF

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No. 83-1307

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

BETTY LOU POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The question presented in our petition concerns the validity of the exception adopted by the court below to the "inconsistent verdict" rule of *Dunn* v. *United States*, 284 U.S. 390 (1932). That issue is fully addressed in our opening brief, and respondent's arguments require little additional discussion. Having failed to justify the court of appeals' departure from *Dunn*, respondent seeks to interject several new issues into the case. However, these issues are not properly raised for review and do not entitle respondent to reversal of her convictions by this Court.

1. In *Dunn* the Court held that consistency in the jury's verdict is not necessary in order to sustain the defendant's conviction on the counts on which he was found guilty. Recognizing that an inconsistency in the verdict could arise from the jury's exercise of its power to acquit the defendant even though it found that the evidence supported his guilt, the Court concluded that an acquittal on some counts does

not invalidate a conviction on other charges notwithstanding the discrepancy in the jury's determination. For more than 50 years this Court has followed *Dunn* without exception, and those opinions firmly rest the "inconsistent verdict" doctrine on the jury's power of leniency. The court of appeals' decision disregards this Court's unbroken adherence to the *Dunn* rule over the last half-century.[1]

Respondent has failed to support an exception to the *Dunn* rule for the telephone facilitation offense at issue in this case (21 U.S.C. 843(b)). She repeatedly argues that, because Section 843(b) requires that a drug offense be facilitated by the use of the telephone, the jury's acquittal on the conspiracy count and the convictions on the telephone facilitation counts are inconsistent. But that observation merely states, and does not resolve, the inconsistent verdict issue presented here. As explained in our opening brief (at 21-22), the jury-lenity rationale of the *Dunn* rule is no less applicable in cases of "compound-predicate" offenses such as Section 843(b) than in any other case. In fact, *Dunn* itself involved a compound-predicate offense (see U.S. Br. 22-

[1]As discussed in our opening brief (at 24 n.31), *Hartzel* v. *United States*, 322 U.S. 680, 682 n.3 (1944), is not, contrary to respondent's understanding (Resp. Br. 45-46), an inconsistent verdict case at all. Because all of the defendants were convicted at trial, there was no inconsistency in the jury's verdict; the only issue before the Court was the sufficiency of the evidence to sustain the conspiracy conviction of one defendant in light of the reversal of the convictions of his co-conspirators, and the government conceded that in those circumstances the remaining conspiracy conviction could not stand. Despite respondent's assertion (Br. 47 n.38), nothing in our submission on the inconsistent verdict issue in this case is at variance with either the government's concession or the Court's ruling (which was substantially adopted from the government's brief) on the question of the sufficiency of the evidence in *Hartzel*.

24), and the decision below is thus squarely at odds with the precise holding in *Dunn*.[2]

Respondent also argues that the jury, in returning an acquittal on the conspiracy count, found "that the predicate [for the telephone facilitation counts] was not established" (Br. 40) and "rejected • • • [the government's] 'proof' of predicate offenses to support [the telephone counts]" (Br. 69 n.56). Because in her view "[t]he jury's verdict of not guilty • • • [on the conspiracy charge] precludes guilt on this specific predicate" (Br. 29), respondent submits that an essential element of the telephone offense is lacking. This argument reflects a fundamental misunderstanding of the "inconsistent verdict" rule and is flatly foreclosed by *Dunn*. *Dunn* recognizes that in inconsistent verdict cases a jury's acquittal, given its power of leniency, cannot be taken to be a determination that the defendant is not guilty of the offense. Rather, "[t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt" (284 U.S. at 393 (citation omitted)). Since, under *Dunn*, an acquittal does not signify that the government failed to establish the defendant's guilt on that count, it does not serve to impeach the verdict on the remaining counts. Accordingly, respondent's convictions on the Section 843(b) counts — which necessarily include a

[2]Respondent's effort (Br. 42-45) to distinguish *Dunn* is entirely unconvincing. She quotes (Br. 44) the Court's summary of the government's argument that the verdicts were not in fact inconsistent (284 U.S. at 392-393). But the Court did not rest its decision on that narrow ground. Rather, the Court made clear that, even where verdicts are inconsistent, such inconsistency is not a basis to set aside the defendant's conviction. See 284 U.S. at 393-394; see also *id.* at 397, 399 (Butler, J., dissenting).

jury finding that she used the telephone to facilitate the predicate offense — are not undermined by her acquittal on the conspiracy charge.[3]

In creating an exception to the *Dunn* rule for the telephone facilitation offense, courts have relied on the discussion in *Dunn* of the doctrine of res judicata (see U.S. Br. 25-26). We have previously demonstrated (*id.* at 26-28) that those courts improperly ignored the settled jury-lenity rationale for the *Dunn* rule and erroneously invoked a discredited analysis of preclusion principles that has long since been rejected as the basis for the "inconsistent verdict" doctrine.[4] Moreover, while respondent is at pains to emphasize (Br. 29, 40-43) what she asserts to be the narrow and unique nature of the exception to the *Dunn* rule for Section 843(b),[5] application of preclusion principles would eviscerate *Dunn* in cases involving multiple charges against a single defendant (see U.S. Br. 29); although purportedly establishing a limited exception to *Dunn*, that line of reasoning "is so incompatible with the general principles governing the subject as to cause it to be, in substance, not

[3]Respondent is therefore incorrect in asserting (Br. 40) that application of the inconsistent verdict doctrine to affirm her convictions would mean that "the jury's finding [in the acquittal] that she did not have the requisite knowledge for conviction of any conspiracy or substantive count [would] be rejected[.]" Moreover, it is respondent's exception to the *Dunn* rule that would require the rejection of the jury's determination; after all, the jury convicted respondent on the Section 843(b) counts that she is seeking to overturn. The *Dunn* rule preserves the jury's verdicts intact and prevents the portion of the judgment favorable to the defendant from being isolated and used to upset the remainder of the jury's findings.

[4]Respondent herself appears to acknowledge (Br. 52-53) that *Dunn*'s treatment of res judicata was of doubtful correctness at the time and in any event is of no continuing validity (see U.S. Br. 26-27).

[5]Elsewhere, however, respondent recognizes the broader implications of her argument, noting (Br. 53 n.42) that "[t]here are exceptions to *Dunn* and [this] case is one of them."

an exception at all, but, under the guise of an exception, a mere disregard or repudiation of the principles themselves." *United States* v. *Thompson*, 251 U.S. 407, 414 (1920). Indeed, acceptance of that approach would mean that *Dunn* itself was wrongly decided (see U.S. Br. 29).

Finally, the *Dunn* rule does not, as respondent asserts (Br. 46-47), eliminate "judicial review of elements of the offense" or "put the jury 'above the law.' " Our opening brief explicitly recognized (at 12, 18-20 & n.25, 24 n.31) that, as in any other case, a defendant in an inconsistent verdict case is free to challenge the sufficiency of the evidence under traditional standards. But the adequacy of the government's proof to support the defendant's guilt is not affected by the jury's disposition of the remaining counts. The *Dunn* rule protects the integrity of the jury's verdict and gives effect to the conviction that the jury returned (see U.S. Br. 16); it is not, contrary to respondent's contention (Br. 47), in any way "a shield to prevent legal review" of the sufficiency of the evidence to sustain the conviction.

2. Respondent next asserts (Br. 29, 55-73) that the court of appeals determined that the evidence was insufficient to uphold the convictions on the telephone facilitation counts. This argument reflects a misunderstanding of the decision below. Indeed, respondent never even argued (aside from her inconsistent verdict argument) that the convictions were not supported by adequate evidence.

In the court of appeals, the government contended that the verdict was not in fact inconsistent because the jury could have found that respondent used the telephone to facilitate a drug offense other than the conspiracy of which she was acquitted. The court rejected this contention, explaining that "[w]e have reviewed the record and we are not convinced that there is evidence to support the

government's claim that 'someone other than' the conspirators named in Count 1 had possession [of the cocaine] and that [respondent's] telephone calls facilitated that possession" (Pet. App. 2a). We have not raised in this Court the fact-bound issue of whether the verdict was actually inconsistent (see U.S. Br. 11 n.10), and the court of appeals' analysis in this respect, on which respondent heavily relies (Br. 56-57), neither bears on the inconsistent verdict question presented in our petition nor indicates in any way that the court below found the evidence insufficient to sustain respondent's convictions.

In addition, in denying the government's petition for rehearing, the court of appeals reaffirmed its exception to *Dunn* for the telephone facilitation offense and, based on that ruling, stated that the convictions "must be reversed for lack of sufficient evidence. • • • • • We adhere to our statement in our opinion that there is insufficient evidence to support the convictions" (Pet. App. 7a-8a). As discussed in our opening brief (at 19-20), the court of appeals' formulation confused the questions of the sufficiency of the evidence and the consistency of the verdicts. The former question must be decided as though the telephone counts had been the only ones prosecuted — *i.e.*, totally without regard to the jury's verdict on the conspiracy count. Respondent did not challenge the adequacy of the government's proof and — apart from the consistency issue — the court of appeals did not make any such evidentiary inquiry. Thus, the decision below rests entirely on the court's exception to the *Dunn* rule and does not reflect any assessment that the evidence supporting respondent's convictions was insufficient under traditional standards.[6]

[6]We note that the Eleventh Circuit has recently held that the exception to *Dunn* for Section 843(b) applies only where the jury acquits the defendant on the count that is the predicate offense for the telephone facilitation charge and not where the jury is unable to reach a verdict and a mistrial is declared on the predicate offense. See *United States* v. *Arrow*, 739 F.2d 549 (11th Cir. 1984). This result appears to us to be consistent with the court's reliance on a preclusion analysis in *United States* v. *Brooks*, 703 F.2d 1273 (11th Cir. 1983) (see U.S. Br. 25; page 4, *supra*), since a hung jury on the predicate offense at an initial trial would not bar prosecution for the telephone facilitation offense in a subsequent proceeding. However, it does not appear to be consistent with the argument, advanced both by respondent (see pages 3-4, 6, *supra*) and by the court in *Arrow* (739 F.2d at 550), that the jury's determination on the predicate count can render the evidence insufficient on the telephone facilitation count; whether the jury hangs or acquits on the predicate count, it does not accept the government's proof of the defendant's guilt, and therefore, under the "insufficient evidence" argument, a conviction on the telephone facilitation count should not stand in either event because of the failure to establish the predicate offense. For the reasons already discussed, we believe the court in *Arrow* confused the concepts of sufficiency of the evidence and consistency of the verdict when it stated (739 F.2d at 550 (citation omitted)):

> [A]n acquittal of the felony upon which the Government relied to support the felony requirement of § 843(b) [makes] the proof insufficient as a matter of law to support the facilitation count. In effect, there being no felony there could be no facilitating of a felony.
>
> The premise of • • • [this analysis is] a jury determination that the underlying felony had not been committed by the defendant • • •.

The premise referred to by the court in *Arrow* is, of course, the very one this Court rejected in *Dunn*.

Respondent also appears to argue that, regardless of whether the court of appeals so found, the evidence was in fact inadequate to prove the telephone facilitation count. Since respondent did not raise this issue below, it is not appropriately presented here.[7] Moreover, that fact-bound question, involving the application of established principles to the particular record in this case, does not warrant the

[7]See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977).

Court's review.[8] To be sure, our opening brief (at 18-19) touched on the sufficiency of the evidence, but this discussion was designed to illustrate the difference between the issues of sufficiency and consistency, not to embroil the Court in what respondent now advances as a contested question. Should this Court choose to reach the question, however, we submit, for the reasons outlined in our opening brief, that the evidence was plainly sufficient and that respondent's attempt to reargue at length the contentions that were made to and rejected by the jury in connection with the Section 843(b) counts is misdirected and unavailing.[9]

3. Finally, respondent presents a miscellany of issues that were not raised below, are entirely unrelated to the question on which certiorari was granted, and do not call for the Court's review in this case.[10]

a. Respondent contends (Br. 73-75) that the telephone facilitation counts in the indictment failed to provide adequate notice of the charges against her. At bottom, respondent's argument is that the indictment was duplicitous because it referred to two predicate offenses (see Resp. Br. 73 & nn.58, 59); so understood, her objection was waived when it was not raised in the district court. See Fed. R. Crim. P. 12(b)(2) and (f). Nor did she present this argument to the court of appeals. Moreover, respondent has failed to indicate how she was misled or prejudiced in any

[8]See, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

[9]We do note that respondent's recitation of the evidence and instructions further indicates (see U.S. Br. 22) that jury lenity is the most likely explanation for her acquittal on the conspiracy count.

[10]Certainly nothing in these extraneous issues supports respondent's passing assertion (Br. 91-92) that the Court should dismiss the government's petition as improvidently granted.

way by the drafting of the indictment. And there is no basis in this case for the "parade of horribles" that respondent hypothesizes; her Section 843(b) convictions were not premised on a facilitated offense that was not charged in the indictment or proven at trial.

b. Respondent also asserts (Br. 25-27, 76-79) that there was a fatal variance between the indictment and the proof at trial because the district court instructed the jury (Tr. 1376-1377) that it could convict on the telephone facilitation charge in Count 5 if it found that respondent had reason to know that a certain package contained either cocaine or quaaludes, even though the indictment referred only to cocaine. Once again, this issue is entirely separate from the inconsistent verdict issue presented in our petition, and it was not raised in either the district court or the court of appeals; indeed, at trial, respondent's counsel, although initially suggesting a different view (Tr. 1373-1374), specifically stated that he had "no • • • quarrel" with the instruction that was given (Tr. 1374).[11] In addition, respondent's argument, if successful, would lead to a new trial rather than the judgment of acquittal that was entered by the court of appeals, and therefore it is not properly advanced as an alternative ground for affirmance.[12] In any event, this argument affects only one of the three telephone counts on which she was convicted and on which she received concurrent sentences.

[11]Cf. *United States* v. *Frady*, 456 U.S. 152, 166 (1982); *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

[12]See, *e.g.*, *Andrus* v. *Idaho*, 445 U.S. 715, 725 n.6 (1980); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); Stern & Gressman, *Supreme Court Practice* 478 (5th ed. 1978).

c. Respondent next argues (Br. 80-88) that she was denied the effective assistance of counsel at trial. Respondent's primary claim is that her attorney had a conflict of interest because he was a confederate of respondent's husband and co-defendant, Ron Powell. Respondent raised this issue in her cross-petition for a writ of certiorari, which the Court denied (No. 83-6617 (June 18, 1984)), and there is plainly no reason for respondent to be allowed to circumvent the denial of her cross-petition by presenting the same question in her brief on the merits in this case.[13] As we stated in our brief in opposition to the cross-petition, the appropriate procedure is for respondent to pursue her remedies under 28 U.S.C. 2255 so that the issue — which respondent has represented was not known to her until after the case had been argued and submitted in the court of appeals — may be considered by the lower courts on the basis of a record to be developed in the collateral proceeding.[14]

d. Finally, respondent argues (Br. 88-90) that the Speedy Trial Act (18 U.S.C. 3161(c)(2)) was violated because she did not consent in writing to the commencement of trial less

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[13]Moreover, because respondent's argument would support only a new trial rather than the acquittal ordered by the court of appeals, and because it would affect her false statement conviction (which is not put in issue by our petition), it is not properly considered as an alternative ground for affirmance.

[14]Respondent also asserts that a remark by her lawyer in closing argument constituted ineffective assistance. Although respondent complained in the court of appeals about a number of specific instances of counsel's performance, she concedes (Br. 86 n.69) that she did not raise this issue. (Respondent was represented in the court of appeals by a different attorney than had represented her at trial; in this Court she is represented by another attorney who was not involved in the lower court proceedings.) Moreover, especially in light of the district court's instruction that "[s]tatements and arguments of counsel are not evidence in the case" (Tr. 1287), we doubt that counsel's remark deprived respondent of her constitutional rights. See generally *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984).

than 30 days after the return of a superseding indictment. Again, respondent admits (Br. 90 & nn.74, 75) that this statutory issue was not only not the basis of any objection at trial, but also was not raised on appeal; it is therefore waived. Moreover, the superseding indictment did not change either the telephone facilitation counts on which respondent was convicted or the predicate conspiracy count,[15] and thus the Speedy Trial Act issue is unrelated both to the legal question and to the counts that are before the Court on our petition. We also note that defense counsel had requested a prompt trial because respondent was in custody (5/19/82 Tr. 8-9; 6/[illegible]/82 Tr. 13), that counsel was given advance notice of the charges in the superseding indictment (6/8/82 Tr. 17, 82), and that counsel thereafter reiterated the request to proceed to trial on an expedited basis and asked that the superseding indictment not delay the proceeding (*id.* at 18, 81-82; 6/14/82 Tr. 4).[16] In light of these considerations, review of respondent's contention is not warranted in this case.[17]

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[15]The superseding indictment eliminated one telephone facilitation count and added two firearms counts (on which respondent was acquitted) and a false statement count (on which respondent was convicted; that conviction was affirmed by the court of appeals and was challenged on grounds other than the Speedy Trial Act in respondent's unsuccessful cross-petition in this Court).

[16]Copies of the relevant pages of the transcript of May 19, June 1, and June 8 are being lodged with the Clerk of this Court and sent to counsel for respondent; respondent has previously lodged a copy of the June 14 transcript.

[17]We further point out that the Court recently declined to review the Speedy Trial Act issue that respondent asserts. See *Williford* v. *United States*, cert. denied, No. 83-6814 (Oct. 9, 1984).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

OCTOBER 1984